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Criminal Law and the Legal Process; Comments by Dr Max Wyman. May, 1975. 1



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**DR. MAX WYMAN
COMMENTS ON THE
CRIMINAL LAW
AND THE
LEGAL PROCESS
MAY, 1975**

Alberta

BOARD OF REVIEW

Provincial Courts

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INTRODUCTION

In indulging my desire to write a report that is additional to the main report of the Board of Review, I should make it clear that this material does not constitute a minority report. I concur fully with the recommendations of the main report. If adopted, the recommendations will result in new policies which will significantly improve the administration of justice in the Provincial Court.

Having said this, I am impelled to voice the deep concern I have about the vast ignorance that exists about the law and the legal process, an ignorance that exists both within and without the legal profession. It is almost unbelievable that the law and the legal process in Canada have no philosophical base, a base that should give purpose and scope to that law and to that legal process. It is inexcusable that there does not exist a definitive empirical base by means of which society can measure the effects that those laws have on the lives of people.

Our laws have grown like Topsy, without purpose, without scope, and with little knowledge of their effect. With three-quarters of the twentieth century now passed into history, it is inexcusable that a twentieth century system of laws and a twentieth century system of legal procedures still remains to be written.

My concern is heightened because of the high respect I have for the law and the legal process. That law and that legal process should be the mirror of civilization as it is now, or might be in the future, not of a civilization that existed hundreds of years ago. In Canada, that mirror has become distorted and opaque, and now reflects a grotesque image of civilization as it has now become.

In a pamphlet called *Studies on Strict Liability*, the Law Reform Commission of Canada wrote as follows:

Unfortunately, the law is, as we have shown, without rhyme or reason and utterly lacking in system. Chaotic and disordered, it is impossible to expound and impossible to ascertain. In consequence the citizen has no sure understanding of his liabilities and responsibilities under regulatory laws; he lacks full understanding of his law. Yet as has been said, what we do not understand, we do not possess. Canadians do not fully possess — in this sphere

— *the law that by right is theirs. Instead they are at the mercy of individual law enforcers and individual courts.*¹

Since this is the law that must be administered by the Provincial Court, I have no qualms in going far beyond an analysis of matters that clearly fall within the jurisdiction of the Government of Alberta. As Albertans, our actions are restricted by the laws of Canada, and we have a right to demand that those laws pass certain standards of quality and clarity.

For this reason, my remarks are addressed to the people of Alberta, although I know full well that our Government may not have the jurisdiction to act alone in bringing logic and order to replace the confusion and chaos that now exists.

In my scheme of things, human life and human dignity have a far higher value than has the monetary value of material property. My remarks are therefore confined to the criminal law and the legal procedure that accompanies that law. I am aware that Canada has a restricted definition of criminal behavior, restricted to forms of human behavior that are forbidden and punishable by federal law. Although the provinces cannot use their jurisdiction to define crimes, they do have the power to define offences, and to punish people who commit those offences. This is a distinction I shall not make. In my scheme of things, criminal behavior is a form of human behavior that is forbidden, and punishable, by law, and it is a matter of no consequence to me whether the jurisdiction flows from the powers of the Federal or Provincial Governments.

Since there can exist an infinite number of philosophies of the law, it is too much to ask my colleagues, Mr. Justice W. J. C. Kirby and Mr. J. E. Bower, to share my particular philosophy, and to share my scheme of things. This is why I write alone. There is no desire on my part to impose my philosophy and my scheme of things on the people of Alberta. My only purpose is to explain the major issues as best I can, and to hope that the inexcusable void that now exists is filled by some philosophy during the next ten years.

In place of a stated and meaningful philosophy, Canadians have a disconnected, sometimes meaningless, sequence of bon mots, and a set of contradictory doctrines. Among these are:

1. all people are equal in the eyes of the law;

¹Law Reform Commission of Canada, "Studies on Strict Liability", June, 1974, p. 177.

2. a person is presumed to be innocent until it is proven beyond a reasonable doubt that he or she has committed a crime;
3. every person has the right to his or her day in court;
4. the Doctrine of Free-Will;
5. the Doctrine of Mens Rea;
6. ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

This list is of course far far from complete.

Although the examples I gave contain elegant thoughts, attempting to embody the highest of principles, they rarely have an accepted meaning. In Canada, we do not know their meaning because we do not say, and say we must. When I explain my philosophy of the law, I do not accept, on an a priori basis, the validity of the dozens, possibly hundreds, of legal maxims that now permeate the law. Indeed, if they are to be retained, they must fight their way into my scheme of things.

In the liberal school of thought, equality in the eyes of the law has the strictest of all possible meanings. According to that school, equality and identity become the same as far as treatment by the law is concerned. According to that school, the offence is all pervasive, and the possibility of different characteristics among those who offend is of no consequence. This is an inhumane definition of equality, one that our society should reject. Among the more important tenets of liberalism, one can find the following statements of principles:

1. Every offence must be unequivocally defined by law. That law must specify a single punishment for each offence;
2. Although laws are necessary, the volume of law should be reduced in size as much as possible;
3. Laws sometimes needlessly restrict the rights of people, and the result will be a needless increase in crime;
4. It is not the function of the law to impose a code of morality on the people who are governed by that law;
5. Every person has the right to obey or disobey the laws decreed by a society;

6. Every person has the same capacity to make a reasoned judgment as to the gain or loss that will result in a decision to commit a crime;
7. Every person commits a crime after making a reasoned judgment that the gain obtained exceeds the loss suffered by obeying the law; (The Doctrine of Free-Will)
8. The purpose of a trial is to adjudicate the guilt or innocence of the accused. A judge has no discretion on the sentence to be imposed on those who are found guilty.

The implications of liberalism are far reaching indeed. Although a detailed analysis of those implications is far beyond anything I can, or wish, to write, some of the implications are worthy of note. Equality in the eyes of the law is to be translated literally and means that everyone, without exception, deserves the same punishment for the same crime. Any other definition would have attacked the fundamental basis of liberalism, a philosophy that rested on the existence of a consistent system of punishment for an unequivocally defined set of crimes.

It is interesting to note that attempts to rehabilitate a criminal would have been forbidden under a liberalist system of law. Indeed, such a program would have been deemed to be a violation of the rights of criminals.

As far as I am aware, the first, and only code, to embrace fully the philosophy of liberalism was the French Criminal Code of 1791. However, this was replaced by the Code Napoleon of 1810, and some of the fundamental principles of liberalism were lost. Although many of the assumptions of this philosophy are provably false, history has rightfully reserved a place of reverence for that school of thought. Its impact is still being felt today.

The liberalist did not realize that the search for a set of unequivocally defined crimes is as elusive as is the search for the Holy Grail. Language is a powerful tool by means of which one person can communicate his or her thoughts to another. In its broadest sense, it is the only tool one has for the communication of thought. However, a language has only a finite number of words, and it is, therefore, impossible to define unequivocally every word in that language. Defining a word like *knowingly* by a chain of synonyms will always end in the state-

ment *knowingly* means *knowingly*, and no other ending to the chain is possible. Some of the words of a language must always remain undefined. This does not mean, however, that such words are devoid of meaning. It does imply that the meaning conjured up in the minds of people might be different for different people. Since those who legislate must use a language to communicate their thoughts to those who adjudicate, it is certain that in some instances the message that is sent will be different from the message that is received. This is a defect of all systems of law, and it cannot be avoided. It does not mean, however, that a society must condone vague and carelessly worded laws. Quite the opposite. Recognizing the existence of defects of this type, those who write the law must strive for clarity and precision, knowing full well that perfect clarity and absolute precision can never be obtained.

In failing to recognize the fundamental defect that all languages possess, the Law Reform Commission of Canada makes an impossible liberalist demand of the law when it writes:

The citizen has a right to know the law, and if any part of the law should be clear and certain, the criminal law should. Since criminal law is the law that authorizes state intervention against the individual, liberty demands that the basis and the bounds of that intervention be clearly spelled out, so that we may know exactly what is forbidden and precisely when the state may intervene. Where mystery begins, observed Burke, justice ends. Mystery in the criminal law then is indefensible.²

The Law Reform Commission does not realize that it fails its own test when it recommends:

that negligence should be the minimum standard of liability in regulatory offences; therefore an accused should never be convicted of a regulatory offence if he establishes that he acted with due diligence, that is that he was not negligent.³

The standard of due diligence that the Commission proposes is the behavior of the so-called *reasonable man*, a fiction of the law that has no basis in reality. The real standard that

²Law Reform Commission of Canada, "Studies on Strict Liability", June, 1974, p. 10.

³Law Reform Commission of Canada, "Studies on Strict Liability", June, 1974, p. 35.

will be used is the standard imposed by those who adjudicate. It will be imposed on the day a trial is heard, and not in advance. It follows therefore that the mystery that is indefensible still remains.

In choosing a system of law, it is unfortunate, but nevertheless true, that a society must make a choice from among an infinite number of alternatives, all of which are imperfect and flawed. Although respect for a particular system of law may be wise, worship of any system is unjustified. A worthwhile system of law must clearly show that time and effort have been used to obtain clarity and precision, in the full knowledge that absolute clarity and absolute precision are beyond the scope of any language, including the language of the law. By the standards enunciated by the Law Reform Commission of Canada, every system of law must fail.

At the beginning of the nineteenth century, the wealthy and the privileged still assumed poverty and depravity to be synonymous. As people of power, their interest in the law was to protect their material possessions from the envy and greed of the poor. They were interested in teaching the poor a mode of manners to which they, the rich, would not be expected to conform. However, by about the middle of that century, a social conscience began to appear, and valid distinctions between the poor and the depraved began to be made. The words of Victor Hugo, "*Savages indeed, but savages of civilization*"⁴, were repeated in different forms over and over again, and people began to seek an aetiology of why people behave as they do. For criminal behavior, the assignment of causes ranged all the way from the born criminal of Cesare Lombroso, the criminal who could be identified from the characteristics of his or her skull, to the Marxian explanation that all crime is due to the improper distribution of wealth. If they are considered to be complete explanations of human behavior, then both of these theories are false.

In our own century, the positivist school of thought led by Enrico Ferri put forward bold and challenging ideas. In describing that school of thought, I can do no better than quote a description written by Leon Radzinowicz in a book with the title, *Ideology and Crime*:

The adherents of that school may not all have been absolute determinists, but none of them subscribed un-

⁴Radzinowicz, L., "Ideology and Crime: A Study of Crime in its Social and Historical Context", 1966, p. 41.

*reservedly to the tenet of free will. Certainly, they were all highly critical of the way in which responsibility under criminal law was regulated and interpreted. They were too firmly convinced of the deep influence upon criminal conduct of the constitutional make-up of the individual offender and of his immediate environment to admit that all, apart from the manifestly insane, could be regarded as fully responsible. They were also convinced that there was a vast range of mental abnormalities and inadequacies which, though short of insanity, impaired the so-called free will of the delinquent; that any attempt to assess these mental variations, and to allow for them within the legal, and necessarily abstract, formulae of criminal responsibility was impossible, and that it would in any case seldom serve the best interests of criminal justice or of the offender. Criminal responsibility, they contended, should not be based on free will but upon the needs of society. It should be concerned not with the guilt of the offender but with his potential danger to the community . . . The defensive sanctions adopted against the offender must be determined not by the nature and the extent of the act, but by his individual aggressive potential.*⁵

It becomes clear that for the positivist, the words, *All are equal in the eyes of the law* can have no meaning other than, *All who have the same capacity to harm society will be treated in the same way by the law*, a meaning that differs as day differs from night from what the same words mean to the liberalist.

A fundamental consequence of positivist philosophy is:

those offenders who have, in the future, a small capacity to harm society should in turn be harmed in a minimal way by that society.

A positivist purist must say that a perpetrator of a heinous crime under bizarre circumstances should be lightly punished if there is little chance of those circumstances coming into existence again in the future. Gone would be the stigma attached to the crimes of antiquity, and some of the harsh punishments would become a thing of the past.

The positivist philosophy did not have then, nor indeed can anyone have now, a meaningful way of measuring the

⁵Radzinowicz, L., "Ideology and Crime: A Study of Crime in its Social and Historical Context", 1966, p. 51.

future capacity of an offender to harm society. Without such a measure, the adoption of positivism would be hypocritical and dishonest. It is just one more example of a philosophy that is created from abstract theoretical thinking, with no empirical testing to justify the multitude of assumptions such philosophies must always make.

Different philosophies normally imply different consequences. For some forms of human behavior, the punishments decreed by these different philosophies may well lie at different ends of the spectrum. A philosophy of the law is necessary so that a society can state as clearly as possible the purpose and scope of the laws to be enacted and the punishments to be decreed. However, what a law actually does can be quite different from what it was originally supposed to do. No philosophy of the law should be considered to be complete unless it has been provided with a mechanism to measure the effect the law has on the lives of people who are governed by that law. It is sad to relate, but nevertheless true, that Canadians have no philosophy of the law. It is a disgrace to relate that we have little understanding of the actual effects of the laws we enact and the punishments we decree.

CONTRARY DOCTRINES AND PRINCIPLES IN CANADIAN LAW

The history of the Doctrine of Mens Rea is interesting and mysterious. It seems to stem from a Latin maxim, *actus non facit reum nisi mens sit rea*, which has been translated into:

*An act is not criminal unless accompanied by a criminal state of mind.*⁶

The doctrine is sometimes referred to as the *Doctrine of the Guilty Mind*.

The term mens rea permeates legal literature, and no one who reads that literature can doubt the importance legal minds attach to the concept involved. Indeed, a Judge of the Supreme Court of Canada has written:

While an offence of which mens rea is not an essential ingredient may be created by legislation, in view of the

⁶Morton, J. D., "The Function of Criminal Law in 1962", p. 7.

*general rule a section creating an offence ought not to be so construed unless Parliament has, by express language or necessary implication, disclosed such an intention.*⁷

Criminal codes do not use the term *mens rea*, and normally describe the so-called guilty mind by words like *knowingly*, *wilfully*, and so on. Prosecutors often confront *mens rea* with the law, *Ignorance of the law by a person who commits an offence is not an excuse for committing that offence*. This law sometimes is applied as if it read, *The ignorance of a person who commits an offence is no defence*, a principle that is in direct conflict with the principle of *mens rea*. The debates that raged over the implications of the many words included or excluded in a law seem to me to lack conviction, but the following case baffles me.

A person was charged with two offences under The Opium and Narcotic Drug Act, Revised Statutes of Canada, 1952, defined by the following sections:

4.(1) *Every person who . . .*

- (d) *has in his possession any drug save and except under the authority of a licence from the Minister first had and obtained, or other lawful authority; . . . is guilty of an offence, and is liable.*
- (f) *manufactures, sells, gives away, delivers, or distributes or makes any offer in respect of any drug, or any substance represented or held out by such person to be a drug, to any person without first obtaining a licence from the Minister, or without other lawful authority; . . . is guilty of an offence, and is liable.*⁸

An accused was once found guilty of both offences, and was sentenced by a trial judge to seven year's imprisonment on each count, the sentences to run concurrently. On appeal, the Court of Appeal for Ontario upheld both convictions, and the sentences imposed. However, when the matter reached the Supreme Court of Canada, that Court, by a three-to-two decision, reached the following conclusions:

⁷Martin, J. C., Mewett, Alan W. and Cartwright, Ian, "Martin's Annual Criminal Code 1972", p. 217.

⁸Friedland, M. L., "Cases and Materials on Criminal Law and Procedure", 1968, p. 215.

1. The essence of the crime is the possession of the forbidden substance. In a criminal case, there is in law no possession without knowledge of the character of the forbidden substance;
2. The wording of this section allows the interpretation that mens rea applies, and if Parliament meant otherwise it should have said so;
3. The prosecution did not prove beyond a reasonable doubt that the person had the knowledge that possession requires, and therefore the appeal from conviction of possession was allowed. As far as the proof given at the trial is concerned, the accused might just as well have had table salt in his possession;
4. The appeal for conviction for sale of a drug was dismissed, and the seven-year sentence for this conviction was allowed to stand.

In the minority dissenting judgment, the claim is made that the language of the section is clear, and, indeed, this judgment says:

On the plain, literal and grammatical meaning of the words of this section, there is an absolute prohibition to be in possession of drugs, whatever be the various meanings of which the word possession may be susceptible, unless the possession is under the authority of a licence from the Minister, first had and obtained, or under other lawful authority. . . .

For all of these reasons, I find it impossible to accede to the proposition that knowledge of the nature of the substance is of the essence of the offence of unlawful possession under the Act.⁹

As I survey the results of this case, I am baffled by what it means and what it says. If one starts from the beginning of this case, at least four judges have said the law is otherwise than stated by the three judges who wrote or concurred with the majority opinion. What then is the law?

To an untrained legal mind, it seems to me that a person was convicted of selling a drug which no one ever proved that he had in his possession. Although there may be some logic in such a conclusion, the logic escapes me.

⁹Friedland, M. L., "Cases and Materials on Criminal Law and Procedure", 1968, p. 221.

Who benefited by all of the time, effort and money that was spent on this case? Certainly not the accused. Although he seemingly won something, the end result was that he still was sentenced to the same seven years in gaol. Certainly not the people who, in the future, are accused of the same crime. This will be just one more case, of many dozens of cases, cited for authority. Some judges in the future will certainly say, as some judges have said in the past, that if the authorities say this then the authorities are wrong. If there is a true benefit to all of this, I fail to see it.

However, my bafflement turns to anger when the majority report quotes, and uses, the words of Lord Kenyon when he wrote:

*I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences as would manifestly ensue from the construction contended for by the defendant.*¹⁰

Lord Kenyon uses a straw man type of argument to justify a tortured interpretation of the words of a statute, and what he is really saying is:

I will adopt any construction of the statute that the words will bear in order to justify the consequences that I think should flow from this statute.

To illustrate the tortured type of construction of words used by judges, I have chosen the word *unlawful*, a word I would have thought would long ago have had an unequivocal meaning within the law. A dictionary definition of the word is:

Contrary to or in violation of law.

One judge, in giving meaning to this word, reasoned as follows:

Lawful means authorized by law. The prefix 'un' may mean simply 'not' and unlawful may be properly used to mean 'not authorized by law'.

Another judge carrying this tortured reasoning one step further says:

. . . the meaning to be placed upon the word 'unlawful' in the expression 'unlawful carnal connection' as it appears in s. 216(1)(a) of this Code must, in my opinion, be that

¹⁰Friedland, M. L., "Cases and Materials on Criminal Law and Procedure", 1968, p. 219.

given to the word 'unlawfully' in s. 217, namely, that the word 'unlawful' in s. 216(1)(a) comprises acts which are known and defined as crimes, but embraces as well, acts which are not contrary to the law in a criminal sense.

Blowing one's nose is not authorized by any law of which I am aware. Most of us would be in deep trouble if this were now deemed to be an unlawful act. If this seems to be facetious, it is not. In this year, 1975, a woman who winked at a man in public was convicted of soliciting. A fundamental assumption of liberalism is that no form of human behavior is to be considered to be unlawful unless that form of behavior is forbidden, and punishable, by the law. Criminal codes deal with that which is forbidden, not with that which is allowed. Judges who use such tortured definitions of the meaning of words are writing the law, not administering it.

In the sections mentioned above, it seems likely that those who wrote this section of the Code made a fundamental error, one that judges should be allowed to correct, but not by the reasoning they chose to use.

Parliament must strive for clarity and precision in passing laws, but a rule of grammar is different from a rule of law. If Parliament breaks a rule of grammar, it hardly is just punishment to send some poor bastard to gaol. Nor is it just, in the same circumstances, to acquit a person guilty of the offence. I am prepared to give judges reasonable discretion in the interpretation of the law, but I am opposed to the attitude of some judges that allows them to manipulate the words of Parliament to write the laws they believe that Parliament should have written.

I am not alone in my bewilderment. In 1889, an English judge had this to say about mens rea:

*Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading . . .*¹¹

Some seventy years later, the criticism becomes much stronger. In a lecture delivered at the University of Toronto, Professor Herbert Wechsler of Columbia University and Director of The American Law Institute, stated:

¹¹Friedland, M. L., "Cases and Materials on Criminal Law and Procedure", 1968, p. 163.

I turn first to the problem of mens rea, which in our jurisdictions, as in yours, is such a steady source of litigation. The law upon this subject is chaotic, as Mr. Justice Jackson of our Supreme Court observed not long before his death, when, writing for the Court, he referred to 'the variety, disparity and confusion' of judicial definitions of 'the requisite but elusive mental element' in crimes.¹²

The chaos and confusion described above does not end with mens rea. Indeed, in many ways it is just a beginning not an ending. Is chaos and confusion the majesty of the law we are supposed to respect? I think not. Much of the law now seems to consist of priestly practices for which no authority can be found among the principles of natural justice. The law has an entrenched mythology most of which should have been laid to rest in the hallowed halls of history. In the past, we as a society have erred in not taking a greater interest in our law and our legal process, an error that should have been corrected long ago. To err once may be human, but to make the same the same mistake over and over again is stupid.

It is a complete mystery to me how a doctrine like the Doctrine of Mens Rea becomes attached to our criminal law. When I enquired about this mystery, the only answer I received was *by common consent*. But, by common consent of whom? Not by the common consent of the people who are governed, because they were never asked to give their consent. Not by the common consent of those who govern because legislation that is passed never mentions the doctrine by name. Not by the common consent of those who adjudicate, because they do not agree as to what the doctrine says, when it is to be applied, and how it is to be applied. How two antithetical doctrines like the Doctrine of Free-Will and the Doctrine of Mens Rea appear and disappear in all or parts of the law is a mystery I have not been able to solve.

In the case mentioned above, it matters not to me which judges were right or which judges were wrong. I am, however, deeply concerned about a situation in which one cannot ask seven different judges the question, *What is the law of Canada in the following relatively simple case?*, and receive an unequivocal answer.

Indeed, it is possible to illustrate by example that, in similar cases, the Supreme Court of Canada has ruled differ-

¹²Friedland, M. L., "Cases and Materials on Criminal Law and Procedure", 1968, p. 165.

ently from the judgment that was given in the case mentioned above. The predictability and the certainty of the law have fallen to such low levels that about all one can say about the Supreme Court of Canada is that it will be the Court that will make the last mistake. In this, I am not being critical of those who adjudicate. My criticism is directed to the tools the judicial process is forced to use.

I would like to go briefly into our past to find out why we have arrived at the position we are now in.

HISTORY

English Criminal Law was introduced into the Province of Quebec in 1763, and extended in 1774 into an area roughly the equivalent to the Province of Ontario. Later, in the year 1800, Upper Canada adopted the criminal law of England without modification. Although that was the time of Sir Samuel Romilly and Jeremy Bentham, two of the leaders in the movement to reform the laws of their time, the effect of their efforts was yet to be felt. Indeed, a significant realization of their efforts was still one hundred years away.

In the period 1750-1850, England had the harshest system of criminal law of any country in Europe, a system that exhibited a cruelty that is beyond belief. It was a time when about 250 separate offences called for capital punishment, but death alone was not enough. It was a time when the law allowed torture before death, and allowed mutilated bodies to be put on public display. It was a time when women were burnt to death, not for witchcraft, but for trivial forms of deviant behavior.

Let me use a study in contrast to impress upon you the harshness of those times:

1. Murder and defacing a coin of the realm both carried the death penalty;
2. Rape and being in the company of gypsies both carried the death penalty;
3. Forgery involving thousands of pounds and the picking of a pocket when the amount stolen had a value of twelve pence or more both carried the death penalty.

Listen to the words of William Eden, 1745-1814, when he speaks about the death penalty for arson:

*I have given a literal transcript of this clause as a strong instance of the vague, unfeeling, undistinguishing carelessness with which penal laws are composed, even in the most polished times. . . . every idea of proportion is obliterated, when the same degree of guilt and punishment is assigned to the incendiary of a populous town, and to the destroyer of a small heap of dried grass.*¹³

As I read the words, *vague, unfeeling and carelessness* applied to the law as it was in the year 1800, I had the uneasy feeling that nothing has changed. In the year 1975, the law is still vague, still unfeeling, and still careless. It is indeed easy for me to accept the validity of the remark, *There is nothing new under the sun, only that which is forgotten*. But that sordid history must not be forgotten. It must be burned into our memory, and be a constant warning that we must be protected from ourselves. A proper system of law is one facet that will help provide that protection, but not just any system of law. It must be a system that is chosen with care, written with feeling, and must exhibit a clarity of purpose and scope.

As the law became harsher, the legal process became more and more permissive. It was the harshness of the law that made judges and juries hew to the so-called *Letter of the Law*, not to uphold the law but to avoid it when possible, and to evade it if necessary. They heaved a sigh of relief when they could find the flimsiest of technicalities that would allow them to bring in a verdict of not guilty for the accused. During the eighteenth and nineteenth centuries, the term *reasonable doubt* had a very real and practical meaning for people connected with the legal process. It meant that they were to search the evidence carefully for any reason they could find to acquit the accused. The term did not mean *a real doubt* or *an honest doubt*. It simply meant that, whether he or she was guilty or not, the behavior of the accused did not deserve the harsh punishment that was decreed, and judges and juries refused to impose such punishments.

Jury after jury committed *pious perjury* when they examined stolen property, and swore on oath that the value of the property was less than twenty-five shillings. Even the fact

¹³Radzinowicz, L., "A History of English Criminal Law: The Movement for Reform 1750-1833", Volume 1, 1948, p. 10.

that actual money, far in excess of twenty-five shillings was sometimes involved, did not bother the juries of that time. To swear otherwise would have meant a sentence of death for the accused.

It is indeed a miracle that from such an inconsistent and illogical system so much good has come. Inconsistent and illogical as it may have been, English criminal law has had a major influence on the legal systems of the western world.

In contrast to the frontier society that Canada was during the nineteenth century, the England of that time was already urbanized and industrialized. Although it was probably a mistake, it is understandable why the common law of England was adopted for use in Canada. It was ready made, and available for instant use. It was, however, a dreadful mistake to preserve its essential features for over a hundred years, and preserve it we have. English judges and lawyers of the eighteenth and nineteenth century would not feel too strange, nor too uncomfortable, with Canadian criminal law as it exists today.

PRESUMPTION OF INNOCENCE AND BEYOND REASONABLE DOUBT

The principle, *A person is presumed innocent until it is proven beyond a reasonable doubt that that person has committed a crime*, is at best misleading and sometimes false. It misleads because it seduces us into believing that innocent people are rarely convicted of crimes. Feelings about the importance of this principle have run so high that the silly statement, *It is better to let nine guilty people go free rather than convict one innocent person*, is repeated over and over again in our literature. First, the statement contains a non-sequitur. Second, if it ever could be shown that 90% of all people who have charges withdrawn or dismissed are actually guilty of the charges that were laid, then I for one would believe that a state of anarchy had been reached. Indeed, in my scheme of things, the percentages should be the other way. It is regrettable that innocent people are convicted of crimes, but honesty and integrity should make us say that the conviction of some innocent people is unavoidable. We should always strive to improve our system of legal procedure in order to reduce the number of such convictions, but we must never pretend that such convictions do not exist.

The following is considered to be a model charge to be given to instruct juries on what this principle means:

I will deal now with what is known as the ‘presumption of innocence’. The golden thread of this presumption is woven deep into the fabric of our law. Simply put, it means that an accused person is presumed to be innocent until the Crown has satisfied you beyond a reasonable doubt of his guilt. It is a presumption which remains with the accused from the beginning of the case until the end. The presumption only ceases to apply if, having considered all the evidence, you are satisfied that the accused is guilty beyond a reasonable doubt.¹⁴

The above passage should be read with the following:

The onus or burden of proving the guilt of an accused person beyond a reasonable doubt rests upon the Crown and never shifts. There is no burden on an accused person to prove his innocence. The Crown must prove beyond a reasonable doubt that an accused person is guilty of the offence with which he is charged, before he can be convicted. If you have a reasonable doubt as to whether the accused committed the offence with which he is charged, it is your duty to give the accused the benefit of the doubt and to find him not guilty. . . .

A question that may come to your minds is, what is meant by the words ‘reasonable doubt’. A reasonable doubt is ‘an honest doubt’, a ‘real doubt’, not ‘an imaginary doubt’ conjured up by a juror to escape his responsibility. It must be a doubt which prevents a juror from saying ‘I am morally certain that the accused committed the offence with which he is charged.’¹⁵

In spite of these eloquent words, assuring us that the rights of the accused are protected up to the n’t h degree, these are the words Lord Goddard wrote about reasonable doubt:

I have never yet heard a court give a satisfactory definition of what is a reasonable doubt, and it would be very much better if summings-up did not use that expression, for it seems to me that, whenever a court attempts to explain what is meant by a reasonable doubt, it gives a

¹⁴Friedland, M. L., “Cases and Materials on Criminal Law and Procedure”, 1968, p. 157.

¹⁵Friedland, M. L., “Cases and Materials on Criminal Law and Procedure”, 1968, p. 152.

*definition or tries to explain the term in a way which is often likely to cause more confusion than clarity. It is far better, instead of using the words 'reasonable doubt' and then trying to explain what is a reasonable doubt, to direct a jury; 'You must not convict unless you are satisfied by the evidence that the offence has been committed.' The jury should be told that it is not for the prisoner to prove his innocence, but for the prosecution to prove his guilt.*¹⁶

This golden thread is not as golden as the model charge would have us believe, and, indeed, the thread sometimes becomes lost in the fabric of the law. In some parts of our law, provincial and federal, the presumption is one of guilt, not of innocence, and the onus is on the defendant to bring forward a defence against that presumption.

If, indeed, the presumption of innocence was to be taken literally, then there would be no justification for any concept of bail, let alone the controversial Bail Reform Act of 1972. The time is long overdue for complete honesty to enter into the law, and a complete re-examination of the principle of the presumption of innocence should be made. In my scheme of things, there is no need for any presumption to be made about guilt or innocence. It should be the object of a trial to establish guilt or innocence, and it should be the responsibility of all connected with that trial to help the court come to the correct verdict. Presumption of innocence is not a principle that would play a significant role in my scheme of things.

Proof beyond reasonable doubt raises the question of the standard of proof that those who adjudicate should use in reaching a decision to acquit or convict the accused. Such a standard should be consistent with the fundamental purpose of the law, a purpose the law is supposed to accomplish. If the fundamental purpose, and possibly the only purpose of the law, is to control crime by punishing the guilty, then society should have a large police force, armed with wide powers to search and seize, and should employ a low standard of proof in the courts. The net effect would result in the so-called police state, a society in which many innocent people are punished along with the guilty. If, however, the fundamental purpose of the law is to protect the innocent from the evils of governments and government agencies, then our police forces must be held severely in check, and guilt in courts must be proven up to the

¹⁶Friedland, M. L., "Cases and Materials on Criminal Law and Procedure", 1968, p. 153.

n'th degree. For those of us interested in human rights and freedom, it is a bitter pill to swallow that the hand that writes the law, designed to protect the innocent, will be the same hand that will write a Magna Carta for criminals. The system designed to expose and convict the maximum number of criminals will as a by-product be the same system that will convict the maximum number of people who are innocent of the crimes with which they are charged. Conversely, it will be true that the system designed to free all who are innocent will be the same system that will free the maximum number of those who are guilty. It is a bitter pill to swallow, but swallow it we must.

When two seemingly paramount principles come into open conflict, it is difficult to choose deliberately to rank one above the other. But difficult or not, the ranking must be made.

In Canada, we are unwilling or unable to state a philosophy from which the purpose and the scope of the law should flow. We react in outrage when vicious crimes are exposed, and demand a transition toward the police state. However, our outrage reaches the same height when unjust punishments are imposed on innocent people, and then we demand a transition toward anarchy. Good law and good legal procedures should be designed in times of tranquility, and they should be designed to endure in times of stress. As the legal profession says, *Bad cases create bad laws*. The use of the War Measures Act at the height of the F.L.Q. crisis in Quebec received, at that time, the overwhelming approval of the people of Canada. However, now that the crisis is over, most of us have a guilt feeling about the use of that Act.

It will at least be an honest statement of fact to say, that society does not face the easy choice between a perfect system of law and one that is imperfect. Unfortunately, we are faced with Hobson's choice, and must choose from alternatives, all of which are imperfect and flawed. It takes courage to say honestly and openly that all systems will sometimes convict the innocent, but that there is no other way if the rule of law is to play its proper role in our scheme of things.

In changing from one system to another, improvement might mean an increase in the rate of conviction of the guilty, or it might mean a decrease in the rate of the conviction of the innocent. Sometimes, if we are lucky, the change from one alternative to another may accomplish both. No one regrets the conviction of the innocent more than I, but if it is an un-

alterable fact of life then it must be recognized as such, and society must go on from there.

When society recognizes, possibly for the first time, what can be accomplished by the law, then it will become possible to talk about the standards of proof to be used by the courts. If, in a trial, the state of mind of the accused is to be an important issue placed before the court for adjudication, then it seems to me to be wise to ask the one person who should know, namely the defendant, to give evidence as to his or her state of mind at the time of the offence. It seems to me to be a hoax to claim that a prosecutor can establish beyond reasonable doubt the state of mind of the accused. The defendant might well have the right to refuse to give such evidence, but in exercising such a right it should be deemed that the defendant has given up all rights to a *mens rea* defence against the alleged charge. The remainder of the trial should only be concerned with whether or not the defendant committed the crime. In my scheme of things, knowing full well that society is forced to operate an imperfect and flawed system of law, it does not seem too much to ask that all who participate in a trial, including the defendant, accept the responsibility of helping the court establish the facts as best they can. If some refuse, then I would not be too troubled if that refusal implied a loss of a right. If we truly seek to improve the administration of justice, then innocent people must help to establish their innocence.

When all the evidence is in, and all the arguments have been made, what then? What standard of proof should then prevail? It is sheer hypocrisy to ask those who adjudicate to say, *This is the verdict, and an overwhelming majority of people who hear the evidence and the arguments would come to the same verdict.* All that should be asked of those adjudicating is to say, *On the basis of the evidence and the arguments, we believe you to be innocent of the alleged crime, and, therefore, the charges are dismissed, or We believe you to be guilty and, therefore, the following punishment is imposed.* This is the honest way, and would recognize that belief is involved, not proof beyond a reasonable doubt, and would leave room for the recognition that the innocent are sometimes convicted of crimes they did not commit.

As has now been repeated several times, the standard *proof beyond a reasonable doubt* is a legacy from a past when the goal was to acquit the guilty in order to escape imposing a sentence of death for petty forms of crimes. Although the use of such a standard was then justified, it still serves the same

purpose now without the same justification. In spite of all that I have said, the goal of protecting the innocent must always be kept in mind, but there must be a better way to accomplish that goal without using this legacy from the past.

CANADIAN LAW

Having given the briefest of sketches of the development of our law, I now would like to go on to give an assessment of where Canadian law stands today. For emphasis, I repeat the assessment of the Law Reform Commission of Canada:

Unfortunately, the law is, as we have shown, without rhyme or reason and utterly lacking in system. Chaotic and disordered, it is impossible to expound and impossible to ascertain. In consequence the citizen has no sure understanding of his liabilities and responsibilities under regulatory laws; he lacks full understanding of his law. Yet, as has been said, what we do not understand, we do not possess. Canadians do not fully possess — in this sphere — the law that by right is theirs. Instead they are at the mercy of individual law enforcers and individual courts.¹⁷

This assessment was made by the Law Reform Commission of Canada in a publication called *Studies on Strict Liability*, June 1974. This publication contains an excellent account of the problems that the creation of a consistent system of criminal law must face, but the solutions proposed are simplistic in one sense, and dangerous in another. Since the Law Reform Commission of Canada has been entrusted with rewriting the Criminal Code, I would like to discuss the philosophy of the law that the members of the Commission seem to have expressed. I quote:

If criminal law has to do with bringing wrongdoers to justice — whether to denounce vice and uphold virtue, or to enable society to focus its attention dramatically on those things that most trouble it — then quite clearly strict liability has no place. Bringing wrongdoers to justice means condemning people, holding them up in disgrace and stigmatizing them as meriting punishment, and punishment that may take a particularly shameful form: imprisonment. Here strict liability would be both illogical and unjust.

¹⁷Law Reform Commission of Canada, "Studies on Strict Liability", June, 1974, p. 177.

Illogical, because it makes the criminal justice system contradict itself and tell a lie about itself. If the law purports to condemn persons as being in the wrong and deserving punishment, it is illogical for it at the same time to condemn and punish persons known to be not in the wrong and not deserving of punishment. To proclaim that a man deserves punishment without deserving it is a self-contradiction. This sort of innocent guilt is utterly absurd, and strict liability here is utterly irrational.

As well, it is unjust, and on two counts. First, justice means that every man should be given his due. To the man who doesn't deserve punishment, however, punishment is never due. Justice limits punishment to those to whom it is due — those who are at fault and are to blame not only because of the act they did but also because of their intention, knowledge, recklessness or negligence. Punishment is never due to those who make mere reasonable and unavoidable mistakes. To err is human and no one can be expected to be free from error. To require a man to be free from simple human error is to ask more than is due from him, and to punish him for such failure is to impose on him more than is due to him.¹⁸

I have quoted this passage in full because I have rarely seen such a tortured argument that violates almost every rule of deductive reasoning. The Law Reform Commission of Canada has been assigned the task of rewriting the Criminal Code. I am alarmed at the direction they seem to be taking. Terms like *wrongdoers*, *vice*, *virtue*, *disgrace*, *stigmatizing*, *shameful*, and *deserve*, may have a rightful place in a philosophy of religion, but they should have little or no place in a philosophy of the law. Indeed, I would deny that there is any agency, religious or otherwise, that compels us to attach the definition to the term *bringing wrongdoers to justice* that has been formulated by the Law Reform Commission of Canada. In my scheme of things, a punishment might be harsh but it should never be shameful. To blindly attach disgrace and stigma to those who are convicted of crimes shows a fundamental ignorance of the actual extent of crime. It expresses an unwarranted holier-than-thou attitude toward those who are caught. An honest attitude might well say, *There but for the grace of God go I*.

¹⁸Law Reform Commission of Canada, "Studies on Strict Liability", June, 1974, p. 15.

When the authors say, *Justice limits punishment . . .* then I want to question who is this *Justice* who expounds a wisdom that we must blindly follow. Indeed, I suspect it must be that blind Goddess who is worshipped so blindly by so many of my legal friends. That blind Goddess is a symbol, not an authority. I do not believe she has revealed her thoughts to anyone in the past, and I doubt that she will do so at any time in the future. It is my hope that we do not wait for those wise words to come before we change a system of law that has become inconsistent, illogical, confused and chaotic.

The authors arbitrarily choose their own definition of the term *those who are at fault* and then cloak it with a mysticism by attributing it to some agency outside of the law. Although the Law Reform Commission of Canada is free to make any definitions it likes, Canadians are just as free to reject those definitions if they see fit. It is arrogant of the members of that Commission to characterize those who disagree with them as being illogical, unjust, self-contradictory, utterly absurd, and utterly irrational. They completely ignore the validity of the words of Francesco Carrara when he wrote:

*Crime is not an entity in fact but an entity in law.*¹⁹

Carrara's statement is the proper view a society should adopt for crime. It clearly implies that no one is at fault until the law, from within itself, defines the meaning of fault. Life often punishes people who err and if a sovereign state makes the same choice, then that state is not necessarily being illogical, nor is it lying. As individuals, we may disapprove of a law and say that it is unjust. We may work to change such laws. But, in a democracy, the mirror that the law must be must truly reflect the will of the majority, and that is all the law can do.

The Law Reform Commission of Canada is free to recommend the adoption of variations of the Doctrine of Mens Rea, something like:

The law will never punish an unlawful form of behavior committed by a person unless that person has the express intention to commit that form of behavior;

but they are wrong to assign to this Doctrine a wisdom that can only flow from the Gods. If they had explicitly stated, as

¹⁹Radzinowicz, L., "Ideology and Crime: A Study of Crime in its Social and Historical Context", 1966, p. 22.

they implicitly have assumed, that this Doctrine is to stand above all others, then none of their detailed arguments should have been necessary. The Doctrine of Strict Liability could have been summarily dismissed by simply noting that such a Doctrine offends the Doctrine of Mens Rea.

However much I approve of the Doctrine of Mens Rea, it is dangerous to award it the stature that is being recommended by the Law Reform Commission of Canada. Indeed, if it becomes paramount, then legal paradoxes will come into being. In my scheme of things, there is room for the Doctrine of Free-Will, there is room for the Doctrine of Mens Rea, there is room for the Doctrine of Strict Liability, there is room for the Doctrine of the Dangerous Offender, and indeed there is room for a host of the doctrines that have become part of the law over hundreds of years. My legal friends might well gleefully shout *but that is what we have now*, and in one sense I might agree. Actually, however, what we have now is a set of contradictory principles. Contradictions will only be avoided if non-overlapping spheres of influence are explicitly created by law so that each principle will unequivocally have its own spheres of influence. This we do not have at the present time, and contradictions in the law do exist, or seem to exist. If these contradictions were eliminated, then the amount of litigation might well be cut by half or more.

I would like to temper the seeming harsh criticism I have made of the Law Reform Commission of Canada. Their work, *Studies on Strict Liability* is well worth reading. As I said before, it enunciates very clearly some of the problems that our society must face in creating a satisfactory system of law. It examines a number of alternatives, and makes an attempt to expound honestly the advantages and disadvantages of each of these alternatives. Where they fail, in my opinion, is in their belief in the infallibility of the Doctrine of Mens Rea, and, therefore, every alternative that contradicts this Doctrine must fail. This is a conclusion I am unwilling to accept, at least on an a priori basis. Certainly we should be willing to place this Doctrine in a position slightly below the stars, and to consider a multitude of alternatives that might then be open for study.

CRIME

In a state of anarchy, without government and without law, there is no crime. Contrary to what anarchists would have us believe, conflict would remain, and the ultimate court

of appeal would be trial by combat. Since this particular form of conflict resolution does not appeal to me, I willingly accept restrictions on my behavior in order to enjoy the freedom a good system of law can give. These restrictions are chosen by those who govern, and the restrictions are called the laws of the land.

For hundreds of years, men and women have debated about what is or is not a fit substance with which the law should deal. The liberalist argued that morality should never be imposed by law. The philosophers wrote about inalienable rights of man, sometimes endowed by a Supreme Being, sometimes flowing from the Goddess of Justice, and sometimes given by the State. The Wolfenden Commission says that there are some things that just aren't the business of the law, and even our Prime Minister says that the state has no business in the bedrooms of the nation. Although some say this and some say that, all arguments seem to derive their validity by an appeal to some agency outside of the law.

In a sovereign state, there are no a priori limits on the substance of the law. The government of that state has the power to legislate on any matter that it sees fit. In a democracy, however, the government should ask those who are governed to advise on, and consent to, the forms of human behavior that are to be forbidden by law, and the forms of punishment that will be imposed on those who persist in practicing forbidden forms of human behavior.

There are no inalienable rights, rights that are given to us by an outside agency, rights that do not change and must be respected until the end of time. Freedom of human behavior is a residual freedom given to members of a society once the laws forbidding certain types of human behavior are firmly put into place. This freedom is the sum total of all possible forms of human behavior less those forms that are forbidden by law. As the number of laws increases, the freedom of the individual becomes curtailed, and this increasing curtailment of human behavior has become a way of life for hundreds of years. It is also one of the major reasons why the so-called rates of crime have increased.

In viewing a proper substance for the law, it is not what the law ought to be that counts, because the word *ought* again implies outside guidance. The proper view is that we, as a society, state what we want the law to be, and assign to the law that substance which will reflect the wishes of our society.

The law is our servant, not our master, and it should serve the purpose assigned to it by each generation of every society.

It does not mean that a minority group, say a religious group if you will, must not attempt to have its moral views reflected in the law. Far from it. This is not the intent of a democracy. What it should mean is that such views must be tested by the democratic process, and that the ultimate view reflected in the law is the view of the majority.

As I said before, members of society do not have inalienable rights, nor do they necessarily have unchanging rights. They only have residual rights. In order that members of society understand what these residual rights are, the law must state as clearly and precisely as possible those forms of human behavior that are restricted or forbidden.

When a society has established a set of laws restricting human behavior, it will find that this set divides its members into two mutually exclusive groups. The first group, the so-called law-abiding members, will obey all of the laws, and the second group, the so-called criminal members, consists of those people who won't. Normally, as the number of such laws increases, the number of law-abiding members decreases and the number of criminal members will increase.

The Law Reform Commission of Canada estimates that there are about 40,000 regulatory offences that have been created by either federal or provincial legislation. If one adds to this the crimes created by the Criminal Code, and the thousands of offences created by municipal bylaws, it is a reasonable estimate to say that Canadians face over 50,000 restrictions on their behavior, and all of them are more or less treated in a criminal context. In such circumstances, I would be inclined to say that ignorance of the law is a pretty valid excuse. With such massive restrictions placed on human behavior, it is interesting to ask, *How many law-abiding citizens do we now have in Canada, law-abiding in a very strict meaning of the word?* The answer, of course, is that we do not know, and probably can never know. It is also true that a society can never know the total volume of crime that is committed in any year. When statements are made that the rate of crime is increasing, the statements have a very narrow meaning, because there is no known relation between the rates that are quoted and the rate of increase in the total volume of crime.

It has been estimated that, on the average, for every person that is convicted of an offence there are at least nine who commit the same offence, but who are neither detected nor

punished for violating that particular law. The Law Reform Commission of Canada estimates that 850,000 people are convicted each year of committing regulatory offences. So when we take all other offences into account, and the 10 to 1 ratio is used, then the data support the conclusion that over 10,000,000 people in Canada commit, each year, an offence that is punishable by law. It is probably true that there is not a single law-abiding adult citizen in Canada today. When we speak of criminal behavior in the broadest sense of the term, we are not speaking of our brothers and sisters who sin, we are speaking of ourselves. As Pogo has said, *we have seen the enemy, and the enemy is us*. This is why I take violent objection to the Law Reform Commission of Canada saying:

*Bringing wrongdoers to justice means condemning people, holding them up in disgrace and stigmatizing them as meriting punishment, and punishment that may take a particularly shameful form: imprisonment.*²⁰

None of this has any place in my scheme of things. If we would but listen to the admonition of Jesus, *Let him who is without sin among you throw the first stone at her*, then we would find as Jesus found that there would be no one left to throw stones. It is enough to assign to the law the purpose of restricting some forms of human behavior, and labelling such behavior as illegal or unlawful. There is no need for the law to add a moralistic judgment by describing forms of human behavior as immoral.

It seems to me a ludicrous decision for a society to adopt a system of law in which all members of that society are deemed to be criminals. The decent and non-violent society that Canada really is makes me believe that a proper definition of criminal behavior should make it possible for the vast majority of our adult population to be classified as law-abiding people. If this is not the case, then it is impossible to expect people to have the proper respect for the law.

The spectrum of human behavior a modern society might want to restrict may vary anywhere from the crimes of anti-quity to the more modern crime of illegal parking. The spectrum of punishments may vary in severity from the taking of the life of the offender to an oral reprimand to the offender. No matter how a society would like to classify restricted human behavior, or how punishments should be classified, the

²⁰Law Reform Commission of Canada, "Studies on Strict Liability", June, 1974, p. 15.

division between two adjacent classes will always be arbitrary. If a society classifies restricted human behavior in two classes: serious or not, and punishments into two classes: harsh or not, one cannot expect the divisions to be so sharply defined that no disagreement will arise about where the divisions take place. All that we can ask of those who govern is that they seek the advice of those who are governed about where the divisions should take place.

At the present time, Canadian law does classify unlawful behavior into two classes, one class constituting the class of indictable offences, and the other the class of summary convictions. Although the Model Penal Code prepared by the American Law Institute recommends three general classifications of offences, I have no real quarrel with the two classifications used in Canada. Historically, indictable offences were used to indicate serious types of anti-social behavior, and summary convictions attempted to deal with the less serious types of such behavior. However, as the years have passed the distinction has blurred, and it has become possible to impose a harsh punishment in a summary conviction.

Every generation of every society must create some standards by means of which every form of human behavior can be judged to be a fit substance for the law or not. The law has now become the ashcan of society, an ashcan into which we throw every unresolved problem of our society. Alcoholism is one and gambling is another. Indeed, the group of crimes called *crimes without victims* often places unnecessary restrictions on human behavior, and sometimes places restrictions that are unenforceable by law. There is an imperative need for the serious types of anti-social behavior to be reserved for the law, and everything else to be taken out of the criminal context, and away from the present legal forms of adjudication. The Law Reform Commission of Canada does not agree, and says:

One way is by keeping the efficiency and 'abolishing' the injustice — by re-classifying regulatory offences as mere 'violations'. This has some value: it manifests that here there is no question of blame, of stigma or of trying to bring wrongdoers to justice. Otherwise it serves little purpose. The injustice of penalizing those who are not at fault is not reduced by calling the offences violations: injustice, by any other name will smell as bad. In truth, this solution — which is that of the American Model Penal

*Code — is not entirely satisfactory: the new bottles still contain the same old wine.*²¹

It is most unfortunate that the Law Reform Commission of Canada has loaded the dice so much in favor of the Doctrine of Mens Rea that any alternative that violates this sacrosanct doctrine must fail for this reason, and for no other reason. People who drive cars and kill do not mean to kill. In its fullest form the Doctrine of Mens Rea would say that such people are not at fault, and should not be punished for killing. They might be punished for speeding, possibly for careless driving, but not for killing. A sovereign state has the power to punish people for killing, and there is no injustice when that state chooses to exercise that power in that way. The Doctrine of Mens Rea is important, but not that important.

In spite of the cursory dismissal of the concept of violations given by the Law Reform Commission of Canada, this concept is one of the most challenging concepts of our time. It is important to take away from the criminal context so much of the human behavior that is restricted by law, and to place it in the proper social context of our time. So much of our abuse of the automobile should not be a question of guilt, of stigma, or of trying to bring wrongdoers to justice. Many of these laws governing such behavior are very necessary under certain circumstances, even at certain times of day. Many of them lose their validity when they are called upon to function under all circumstances, and at all times of the day. Indeed it is my hope that the concept of *violations* will be adopted by our society, and that a completely new form of adjudication will be used to punish those people who commit *violations*. It will only be in this way that we will reserve for the law the substance it should have, and allow the law to earn truly the respect of the people who are governed by that law.

If nothing more, the sharp difference between the recommendations of the Law Reform Commission of Canada and those to be found in the American Model Penal Code should emphasize the need for Canadians to write a philosophy for the law. Do Canadians want to follow the Law Reform Commission of Canada when they say the people are not at fault if they do not intend the resulting consequences of their behavior? Do Canadians want to follow the Doctrine of Free-Will, and say just the opposite, namely that people are to be

²¹Law Reform Commission of Canada, "Studies on Strict Liability", June, 1974, p. 31.

held responsible for the resulting consequences of their behavior? Do Canadians want to weave both principles into the fabric of the law, in such a way that they both participate in a consistent and non-contradictory fashion? In Canada, we do not know because we do not say, and say we must. Canadians should write a philosophy for the law.

Such a philosophy is not complete if it is based entirely on abstract and theoretical argument. It must be a philosophy that is created to meet the real needs of real people, and therefore it must never be considered to be complete unless it is accompanied by a testing procedure that measures in an accurate and meaningful way the effects that law has on the people who are governed. If upon testing, it is found that a particular law punishes mainly the poor, punishes mainly the members of a particular religious group, punishes mainly the members of our native population, or a host of other sub-groups of society, then that law should be re-examined in the light of the information that testing has provided. What laws should do and what they actually do can be quite different things, and knowledge of the latter can only come from an extensive empirical base created to study the effects of the law.

If and when Canadians write that philosophy, they should not make the mistake of Francesco Carrara who once wrote a criminal code. Radzinowicz writes:

Not so Francesco Carrara, the acknowledged head of the continental classical school of criminal law. Comfortably wrapped up in his refined juristic formulae, in the objective, almost impersonal, acts or omissions that might amount to a punishable entity, he deliberately ignored and cut himself off from the social, moral and penal conditions that have so intimate a bearing upon the proper understanding of crime and its control. He failed to perceive any impending change in the climate of opinion. To him the new dogmatic edifice had been completed down to its last details, and rested upon a foundation that could no more be challenged. The triumph of classicism was complete.

In conformity with this conviction, widely shared at the time, he advised the undergraduates of the University of Pisa, at his inaugural lecture in 1873, to devote themselves to the study of criminal procedure rather than to that of the substantive law, because, in the latter field, as he put it 'there remains little to be added to what has already been done by your fathers'.

*The records of history are full of such complacent assumptions, followed by their irreverent reversal.*²²

In seeking a system of law and a system of legal procedure, no generation is required to allow the judges of the past to dictate the judgments of the future. No generation will be permitted the luxury of choosing between a perfect and an imperfect system of law, since all such systems are imperfect. No absolute meaning can be attached to a statement that one system of law is better than another, since each might be better for a particular society, at a particular time in the history of that society. Each generation must be accorded the privilege of creating its own criminal classes, being guided, but not dictated to, by the past. All of this should be so, because each generation should be allowed to live by its own decisions. Each generation should write its own philosophy for the law.

CRIME AND PUNISHMENT

I write unwillingly about the punishment of criminal behavior because it is a subject about which I know very little. It has, however, become impossible for me to ignore the sordid history mankind has amassed in the punishment of one human being by another. Almost every form of cruelty that one can envision has been used at one time or another in our history, and the use of that cruelty was always justified on the basis of the deterrent value of that form of punishment. This deterrent value has always been assumed to exist, but no one has ever measured the extent to which it actually does deter. In the field of punishment, it is easier for me to say what I am against rather than what I am for.

I am against the exemplary form of punishment in which a judge imposes a harsh sentence on one or more offenders to serve as an example which others are not supposed to follow. Judges must be free to use the discretion that is given to them, but, as far as I am aware, no judge has been given the right to use this particular form of sentencing. It is a right that they have gathered unto themselves. I am against the form of sentencing in which a judge rewards an offender for pleading guilty, thereby saving the state time and money. People should not be rewarded for failing to exercise their rights, nor should people be punished for choosing to do so.

²²Radzinowicz, L., "Ideology and Crime: A Study of Crime in its Social and Historical Context", 1966, p. 27.

Imprisonment for me is a form of slavery, and society should never impose such a harsh punishment on any of its members without understanding and saying why it does so. The Model Penal Code of the American Law Institute makes a valiant, but futile, attempt to do this when it says:

- (1) *The court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public because:*
 - (a) *there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime;* or
 - (b) *the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution;* or
 - (c) *a lesser sentence will depreciate the seriousness of the defendant's crime.*²³

If any group had the knowledge and wisdom to carry out such a policy in a meaningful and measurable way, then the whole population should be so examined to prevent crime before, rather than after, the fact.

What is meant by the term *undue risk*? At best, it can mean that the prediction of the court should be based on some statistically determined probability of future behavior of a class of people with certain characteristics. No such probability has ever been established that in any sense can be used with accuracy as a predictor of human behavior. What is the probability that a person found guilty of committing one offence will commit, on being freed, the same offence within one month, one year, or ten years? No one knows. What is the probability that a person found guilty of committing one crime will commit, on being freed, a completely different crime within one month, one year, or ten years? No one knows. If we did know all of these probabilities, how would we define undue risk? Would we free a group who have committed crimes if we knew that 50%, 60% or 70% of the group would lead a virtuous life? Society reacts with outrage when a person, free on bail, suspended sentence, or parole, commits a particularly

²³American Law Institute, "Model Penal Code", May, 1962, p. 106.

disgusting form of crime. In our outrage, we demand that those who grant bail, suspended sentences, or parole, do better in the future than they have in the past. But the fundamental question is, *Can they do better?* I think not.

In order to illustrate the problem faced by those who have the power to free criminals, or suspected criminals, I have chosen a fictitious rate of recidivism, say 10%. This will mean that for the particular group under consideration, it will be assumed that 90% will lead the virtuous life for evermore. Surely this should be sufficient to say no undue risk is involved and that such a group should be freed. However, as soon as seven of this group are freed, the odds are better than 50-50 that at least one of the seven will commit another crime. If that crime takes a disgusting form our rage will surface again, and that rage will be vented without justification on the Bail Reform Act, judges, or parole boards. If, however, we want to reassure ourselves that the risk was not undue, then it might be pointed out that the odds are 10 million to 1 that at least one of the seven freed will go on to lead the virtuous life. However, all of this is hypothetical and mathematical and bears no resemblance to real life. Judges and parole boards must work with unknown rates of recidivism. If these rates were known, they would likely be closer to 50% than they are to 10%. The odds would increase to over 100 to 1 that one out of seven freed would commit another crime. As well meaning as the American Law Institute may be, it shows a singular lack of understanding of the problems judges and parole boards must face.

Statement (b) is a pious platitude that enables us to believe that punishment by confinement is for the good of the offender. It completely begs the question of whether such treatment exists at all, and, if it does, whether or not the most effective treatment will take place by confinement in one institution or another. Why save such important treatment for the unsuccessful criminals, those who are caught? Hundreds of thousands of us indulge ourselves in theft, fraud, smuggling, and so on, and go undetected and unpunished. It is beyond my belief that a treatment could exist that would prevent the recidivism of people confined to a gaol, but could not be effectively introduced into our schools.

The debate on punishing the illegal or unlawful behavior of people has been long and vexing. We seem no closer to the end of that debate than we were hundreds of years ago. In spite of my obvious distaste for punishment, I believe that there are dangerous offenders, and that such people should be con-

fined or imprisoned. Confinement as a form of slavery is sufficient punishment for me, and additional forms of punishment during a period of confinement would, in my opinion, be rarely justified. Although I hardly advocate that criminals be given the luxury of a first-class hotel, it is difficult for me to believe that it is really necessary to cage like animals the majority of these people.

The only honest reason that I can see for punishment of offenders is punishment for the sake of punishment, pure and simple. Punishment for deterrence is claimed, but is never proven. Punishment for rehabilitation is claimed, but is rarely attained. So I retreat to liberalism, and would say to those who disobey the law, *This is the price that you will pay.*

Whatever the reasons a society chooses to give for punishment, that society should be honest in stating those reasons, and understanding about the effects of those punishments.

CRIMINAL BEHAVIOR AND MORALITY

Although we of the western world boast of the complete separation of church and state in government, no serious claim should be entertained that a complete separation of church and state in the realm of the law has ever been attained. Indeed, it is doubtful in my mind whether a serious attempt has ever been made to attain such a separation. Part of this is understandable. Some forms of behavior are classified as sins by some religions and the same forms of human behavior are classified as crimes. There is, of course, nothing wrong in the disciplines of law and religion claiming overlapping jurisdiction. What is wrong, in my opinion, is when one is expected to flow automatically from the other. It is dreadfully wrong when the law attempts to obtain its meaning and its validity from some other discipline.

The Report of the Canadian Committee on Corrections states:

In Massachusetts Bay Colony, idolatry, witchcraft and a child's cursing or hitting his parents; in Newhaven Colony profaning the Lord's Day by work or sport and doing it 'proudly, presumptuously and with a high head' were capital offences.²⁴

²⁴Report of the Canadian Committee on Corrections, "Towards Unity: Criminal Justice and Corrections", March, 1969, p. 186.

Here, it is the moral nature of the offences, rather than the harshness of the sentence, to which I wish to call attention. Closer to home, the charge against Louis Riel began with the words:

*That Louis Riel, being a subject of our Lady the Queen, not regarding the duty of his allegiance, nor having the fear of God in his heart, being moved and seduced by the instigation of the devil as a false traitor against our said Lady the Queen . . .*²⁵

As I read the charge, I could not but wonder who, under the rule of best evidence, was called by the prosecution to prove beyond a reasonable doubt a charge of this kind. Certainly not the God nor the devil of Louis Riel.

In order to bring the debate on crime and morality into a modern context, I would like to quote rather extensively from the 1959 Maccabean Lecture given by Lord Devlin on *The Enforcement of Morals*.

Devlin states some of his fundamental assumptions in the following way:

*Society means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price . . .*²⁶

Common morality indeed. Our society cannot agree on which day of the week is the Lord's Day, let alone what we should or should not do on that day. Devlin states dogmatically without proof that no society can exist without having a common morality, and uses this polemical sweeping assertion to say, since societies exist they have a common morality. When

²⁵Harvey, The Hon. H., "The Early Administration of Justice in the Northwest", p. 11.

²⁶Friedland, M. L., "Cases and Materials on Criminal Law and Procedure", 1968, p. 68.

he tries to measure in a positive way that common morality, Devlin flounders. In no way does he successfully establish the existence of a common morality.

Besides this, Devlin has missed the whole point of the debate. Few question the power a society has to legislate on any matters it sees fit. In the realm of human behavior, few question the existence of two distinct institutions, religion and the law, both of which make an attempt to control that behavior. As both have developed, the two institutions have normally shared common areas of human behavior that both have attempted to control. There is nothing wrong in such a situation. In the past, serious conflict has arisen when one institution tried to dominate the other, and the attempt at domination has not been restricted to just one of these institutions. In a democracy, we believe that people should be free to think about, and practice, religion as they please, and to worship as they see fit. Normally religious matters are not considered to be a fit substance to regulate by law. Nevertheless the law must be paramount in the regulation of matters that are common to both disciplines. Religious cults that believe in bigamy, murder, and so on, will be punished by the law.

For centuries, religious groups have attempted to have their views on human behavior enforced by the law, and the agencies of the law. There is nothing wrong in that. In a democracy, every group, majority or minority, should be free to voice its views, and should be free to use the democratic process to have its views reflected in the secular laws that govern human behavior.

The fundamental difficulty that I see in the debate about crime versus sin is the failure to recognize that there are, and should be, two separate disciplines involved, and that both should be self-contained. I strenuously object to people being charged with offences by the law, only to find that those offences are defined, or supposed to have been defined, in some other discipline. The law is uncertain enough as it is, without introducing that kind of uncertainty. This point of view never seems to be brought out by many of the protagonists who have entered the fight. Indeed each seems to want some authority outside of society to have ultimate jurisdiction to decide the issue. One appeals to the Goddess of Justice, and the other to the Supreme Being.

On one hand, one group says that there are aspects of human behavior that are *not the business of the law*. Another group says *there are forms of human behavior that must be controlled by law*. There are no theoretical limits on what is

or is not the business of the law. There are only those limits that a society sees fit to impose upon itself. In this matter, I agree with Lord Devlin. Where I disagree with him is when he violates his own argument, and tries to show that there is a morality which must become part of the law. His words are:

How is the law-maker to ascertain the moral judgments of society? It is surely not enough that they should be reached by the opinion of the majority; it would be too much to require the individual assent of every citizen. English law has evolved and regularly uses a standard which does not depend on the counting of heads. It is that of the reasonable man. He is not to be confused with the rational man. He is not expected to reason about anything and his judgment may be largely a matter of feeling. It is the viewpoint of the man in the street — or to use an archaism familiar to all lawyers — the man in the Clapham omnibus. He might also be called the right-minded man. For my purpose I should like to call him the man in the jury box, for the moral judgment of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous. This was the standard the judges applied in the days before Parliament was as active as it is now and when they laid down rules of public policy. They did not think of themselves as making law but simply as stating principles which every right-minded person would accept as valid. . . .

*Immorality then, for the purpose of the law, is what every right-minded person is presumed to consider to be immoral*²⁷

As an aside, I cannot refrain from commenting that in law we now have a *reasonable man* who does not reason. We have room for a *right-minded person*, but no room for the *left-minded person*, a form of political discrimination. Without being facetious, however, it is important for us to understand that the law has created fictitious standards that have no basis in reality.

Although Devlin believes that he is extolling the virtues of English law, he actually reveals the weakness of that law. The one way that I would accept for finding the views of society, namely majority opinion, he rejects. If one were to continue to draw at random twelve jurors from among the members of society, and require unanimity of opinion for every draw, then moral judgments must in fact receive unanimous agreement

²⁷Friedland, M. L., "Cases and Materials on Criminal Law and Procedure", 1968, p. 70.

from every member of that society. This would mean that there are no moral judgments at all. What he does not realize that he is saying is that English law will be decided by a random process, and the law governing a particular trial will be whatever that random process says it will be on that day. What an invidious form of Russian roulette to play with the lives of people. I reject it out of hand.

Randomness of this type detracts from, rather than enhances, the certainty the law attempts to obtain. Such an imposed randomness, whose value has long been lost in the past, should have no place in modern law. The time has come when we should willingly abandon the jury system.

In a trial involving a charge of what is sometimes called statutory rape, the question of the chaste character of the girl involved must be established. Here is what one Canadian judge said was the meaning of *chaste character*:

*Previous chaste character means moral cleanliness in the sense that a reasonable number of right-thinking persons who are aware of her conduct would say there is an absence of sexual impropriety and indecency.*²⁸

He, however, stated that it would be better not to attempt to define the phrase for the jury.

In essence, this judge admits that he cannot define *chaste character* from within the confines of the law. His appeal to an outside authority is meaningless. Is a reasonable number one, ten, or a million? Who is this mythical right-thinking person to whom the jury can appeal for an opinion? Indeed, they are not even allowed to make a try to find such a person. For the person on trial, the law of Canada then becomes what that jury, on that day, says it is, and five years of a man's life hang on the uncertainty of how a jury may interpret two words, two words that have no legal meaning.

Every generation of every society can choose, as it sees fit, to legislate on moral matters. Since I do not want the law to save me from my own actions, I would envisage that there should clearly be an offender and a victim before the law steps in. The viability of Canada will depend, in my opinion, on the extent to which it welcomes different cultures and different moralities. Although we must concede that a society has the power to legislate on matters moral, it will be a wise society that seldom exercises this power. If it chooses to do so, then it should be done thoughtfully and carefully, and for stated cause.

²⁸Martin, J. C., Mewett, Alan W. and Cartwright, Ian, "Martin's Annual Criminal Code 1972", p. 101.

THE RESOLUTION OF CONFLICT

In indulging our desire to control certain types of human behavior, it is axiomatic that there must exist an agency that has an authority that is higher than that accorded to an individual. If there exists a higher authority, then there must be a highest authority, an authority from whose decisions there will be no appeal. Each society assigns to its government, or governments, the task of creating laws governing the behavior of the members of that society. It is envisaged that two types of conflict will arise. One involving two or more different members of society, conflicts governed by the so-called civil law. The other involving a dispute between a member of society and a representative of the government of that society, conflicts governed by the so-called criminal law. As always, it is with the resolution of conflicts arising out of this latter type of law that I am concerned.

How should conflicts of this type be resolved? Since the government is always one of the litigants in this form of dispute, it is argued that the conflict-resolving agency should be independent of government itself, an argument I accept. It is thus that the concept of an independent judiciary became woven into our fabric of life, a concept that has served us well. In Canada, the heavy hand of government plays little, or no, role in the resolution of our conflicts.

Our courts have developed rules governing the concepts of *a fair hearing* and *due process*, rules that have taken hundreds of years to develop. In spite of the harsh words that I have written about the law as it is today, I have nothing but praise for what it was meant to be. Indeed, in reading the literature of the law, one can hardly fail to recognize the brilliance of the many ideas that have been explored and developed over many years.

Indeed, the application of justice is so important in my mind that it is possible for me to state unequivocally that there is no limit on the amount of money a society can justifiably spend on the application of justice. But then, the same could be said about education, health, welfare, and a host of other activities that an enlightened society should willingly support. Having said this, it is important to say that no society has an infinite amount of money to spend on any activity, no matter how justifiable that activity may be deemed to be. There is no value in entering, as the Law Reform Commission of Canada seemingly does, a debate between justice and injustice, because

the very words used determine the outcome of such a debate. The true debate is between justice and education, justice and health, and, of course, between every possible combination of our desires to provide for the good life. In the end, the debate is always between the possible and the impossible, and again the words used determine the outcome of that debate.

In Canada, the total convictions for offences of all types rose from 42,148 in 1901 to 4,066,957 in 1965. The rate of increase in convictions has itself increased from 1,236 per 100,000 population, 16 years or older, to 32,010 per 100,000 population, 16 years or older. My purpose in citing statistics of this kind is to call attention to the vast increase in the amount of conflict to be resolved, not to call attention to an alarming increase in the rate of crime. Actually the increase is mainly due to the increased use and the increased abuse of the automobile. These data record only convictions, and no information is contained on the number of dismissals that were won, or the number of charges that were withdrawn. In any event, during 1975, it is not unreasonable to assume that there will be over 6,000,000 criminal conflicts that must be resolved.

If every one of these conflicts is to have its day in court, and each is to have the tender loving care that the legal process can and should give, it would cost Canada over 10 billions of dollars to resolve conflicts in this way. However that sum of money places that which is desirable into the realm of that which is impossible. Canada therefore must devise some other way to resolve its criminal conflicts. We are speaking of what must be, not what should be.

Although I might regret that we may be unable to provide justice in its purest form to all who seek it, I have no regrets when I contemplate that what we now have might be abandoned. In the Provincial Court, the time given for adjudication is measured in minutes, and any appearance of justice in that adjudication is by accident rather than by design. I am not being critical of Provincial Court judges, or other people who are involved in a trial. They do the best they can. But with the tools they are now given to operate their courts, all they can dispense is factory, not legal, justice.

If an accused is being tried for a form of behavior that is as serious as the behavior involved in the crimes of antiquity, then extreme care should be taken to determine the innocence or guilt of the accused. The punishment of those convicted of this type of crime envisages a serious disruption in the lives of those so convicted. A modernized version of the present court

system might well be used for adjudication and sentencing. The volume of such cases is small, and it should be possible to award to such cases the time, the care, and the thought such cases deserve to have.

At the other end of the spectrum, millions of people look upon the so-called punishment for a particular type of behavior as a licence allowing them to indulge in that particular behavior. Illegal parking is one illustration of this sort of behavior, and speeding under safe conditions is another. So much of this type of behavior has been accepted as part and parcel of our way of life that the vast majority of people have divorced this type of behavior from any form of criminal context. Under such circumstances, society should react in several ways. Some of this type of behavior might now be deemed acceptable, and all attempts to control such behavior might be abandoned. If controls are still deemed to be necessary, then a casual type of adjudication might be used, and, indeed, in some instances, no adjudication need be provided. People who do not pay utilities bills are first warned that such bills are due, and then the utility is cut off if the warning is not heeded. Such a concept should be applied to some of the situations now governed by regulatory laws. Most people will admit violations of such laws, and will pay the fines involved. All that is needed is a convenient place, not a court, for such fines to be paid. Innovative procedures are available to collect fines from those people who are unwilling to pay.

However, between the two extremes of human behavior, there is still required an adjudication of some type, and some investigation into the circumstances under which the behavior occurred. In this area, an administrative type of adjudication and investigation should be used to a far greater extent than it is today. I realize that many people consider administrative law to be an evil, because in their view this type of law replaces the rule of law by the rule of men. This argument I reject. No matter what form of adjudicative procedure is adopted, men and women must administer that procedure. Any such system will be subject to errors, and even to abuse, but it is false to believe that one system is by nature less subject to error and less subject to abuse than is another. It is the competence and integrity of the people involved that give a system its level of competence and integrity. When society itself removes some forms of human behavior from the criminal context, then to say that justice demands that every person must have his or her day in court is a demand I would reject. Casual adjudication does not mean unfair adjudication. It should really be taken

to mean that forbidden behavior that a society condones in a casual way should receive a much less formal type of adjudication than it now receives.

Returning to the courts, it is my contention that every classification of forbidden human behavior that is to be adjudicated by a court should be adjudicated by one and only one court of first instance. If there ever was a valid reason for our present system of courts to have overlapping jurisdiction, then that reason seems to have disappeared. There is considerable support for merging the District Court with the Trial Division of the Supreme Court. Although this might be sound, it is not really the issue to which I wish to direct attention. It may be necessary, or desirable, to have a number of distinct courts, each with its own jurisdiction, but no two should have a common jurisdiction. In that way, the nature of an offence will determine the unique court in which the offence will be tried. Under our present system, the Provincial Court might become the court of first instance for about 90% of all offences.

Two procedures should be abandoned. There is no need, in my opinion, for the use of juries, and the preliminary hearing serves no useful purpose. In an egalitarian classless society trial by peers has no meaning, and a fundamental reason for the jury system has disappeared. The random choice of a jury introduces an element of uncertainty into a trial, and such an element of uncertainty should not be tolerated. If trials are of such serious nature to warrant adjudication by more than one person, then panels of judges should be used, a legal procedure that is often used in higher courts. In Canada, two procedures, the preliminary hearing and a grand jury hearing, are used to investigate criminal behavior. They are not courts, and have no power to find people guilty of crimes. In theory, they are supposed to protect the innocent, but no evidence is available that such a purpose is actually accomplished. As far as I am aware, the grand jury system has never been used in Alberta. If the preliminary hearing is to accomplish anything, it must be very close to a trial. No person should be acquitted at a preliminary hearing unless the judge believes that person to be innocent. Similarly no person should be sent to trial from a preliminary hearing unless the judge believes that person to be guilty. Under such circumstances, it would seem better to me if all persons, guilty or innocent, were sent directly to trial, directly to a court of first instance.

If the preliminary hearing is just a rubber stamp operation, then it certainly serves no useful purpose. It may save innocent

people from the trauma and expense of a trial, but only if the hearing is itself close to a trial. On the other hand, it seems to me that an accused, sent to trial from such a hearing, enters that trial with a pre-adjudication that there is a strong presumption of guilt. This offends my sense of fairness.

THE CRIMINAL CODE OF CANADA

Rarely have I read a document that is as stark and naked as is the Criminal Code of Canada. It attempts to list forms of behavior that are forbidden by law, without any attempt to explain why they are so classified, and no purpose is given to justify the existence of these laws. Sometimes legal definitions are given, and sometimes they are not. Sometimes a certain line of defence an accused might use is expressly forbidden, but in most instances the Code is silent on what may or may not be a satisfactory defence.

The illustrations I shall use have been taken from Martin's Annual Criminal Code, 1972. Since they are illustrations, the fact that they may not be up-to-date is a matter of no great importance. The publication mentioned above attempts to alleviate the starkness of the Code by including summaries of important cases from the past. Commentaries on these cases illustrate some of the important issues that have been raised at previous trials. Although a valuable asset in seeking a possible line of defence, it is not nearly so valuable in seeking an answer to *What is the law?*

There is a legal maxim that *A man is presumed to intend the natural consequences of his act*. If read literally, the maxim states almost the exact opposite to the Doctrine of Mens Rea. Note the following quite different interpretations of the maxim by three different judges:

1. *When people say that a man must be taken to intend the natural consequences of his acts, they fall into error; there is no must about it: it is only 'may'. The presumption of intention is not a proposition of law but a proposition of ordinary good sense. It means this: that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them.*²⁹

²⁹Martin, J. C., Mewett, Alan W. and Cartwright, Ian, "Martin's Annual Criminal Code 1972", p. 165.

2. *The accused is presumed to intend the consequences of his own act subject to drunkenness or provocation . . . so that if this deceased sustained that injury in the course of that fight, then the accused must be considered to have intended all the consequences of his acts on that occasion, . . .*³⁰
3. *The test must be applied to all alike, and the only measure that can be brought to bear in these matters is what a reasonable man would contemplate or not contemplate. If the act is one about which the jury can find that a reasonable man would say: 'It would never occur to me that death would result or grievous bodily harm would result', then the jury can find him guilty of manslaughter. If, however, the jury come to the conclusion that any reasonable person must have known that what he was doing would cause at least grievous bodily harm, and if the child died of that grievous bodily harm, then a verdict of murder is justified and what was done does amount to murder in law.*³¹

The first judge says that the legal maxim is not a rule of law, but that the jury might justifiably use the actual act to infer the existence of the so-called guilty mind. The second judge says the maxim is a proposition in law and that no judgment by the jury is required. The third introduces that fictional *reasonable man*, a man who does not have to reason, to dispel all doubt a jury may or may not have. A person's life is at stake, and yet we flounder in a morass of this magnitude.

The act involved in the above discussion says, *where a person, . . . does anything that he knows or ought to know is likely to cause death.*³² In one breath the act applies the Doctrine of Mens Rea, and in the next withdraws it. The Statute almost, but not quite, substitutes the Doctrine of Free-Will. Since an allegation of murder is involved, this contradiction has caused endless litigation, and in England, at least one case ended in the House of Lords. At least two judges openly stated that they would not, in future cases, accept the interpretation of the House of Lords.

In these cases, a person's liberty is always at stake, and sometimes the life of the accused is in jeopardy. It is, in my

³⁰Martin, J. C., Mewett, Alan W. and Cartwright, Ian, "Martin's Annual Criminal Code 1972", p. 165.

³¹Martin, J. C., Mewett, Alan W. and Cartwright, Ian, "Martin's Annual Criminal Code 1972", p. 168.

³²Martin, J. C., Mewett, Alan W. and Cartwright, Ian, "Martin's Annual Criminal Code 1972", p. 164.

opinion, disgraceful when the value of such prized possessions recedes into the background, while those who take part in a trial debate the meaning of a vague phrase like *ought to know*. Indeed, Professor J. D. Morton once wrote:

*In the most extreme case, a man might be convicted of murder for doing an act which he does not know is likely to cause death for an object which he does not know to be illegal.*³³

Surely this is a sad commentary to write about our law.

The history of cases tried under criminal law is permeated with fictitious standards created by judges who impose on themselves or on juries phrases like *the reasonable man*, *the prudent man*, or *the law-abiding person*. There is no legal meaning that can be given to such fictitious standards. All that can happen in such circumstances is that those who adjudicate will say, *We are reasonable people, and therefore our standard of conduct will be imposed on the accused*. But this is not enough, because the law will normally allow a deviation from the standard, and often it must be shown that the behavior of the accused is a gross deviation from that mythical standard. Here we no longer have law. We have a never-ending, repetitious, and tedious, debate about the meaning of words, all the while the lives or liberty of people are at stake.

If one reads the history of our laws governing sexual behavior, it is difficult to escape the conclusion that our ancestors viewed sexual intercourse as a necessary evil to propagate the race, but, necessary or not, it was an evil that had to be rigidly controlled by law, and by the imposition of harsh punishments. It was the lust of the male that was responsible for all sex acts, and decent women acted as passive, even unwilling, participants in that act. Indeed, no decent woman would become a sexual partner unless:

- (a) she was forced to do so (rape);
- (b) she was promised marriage (seduction);
- (c) she contracted to do so (marriage).

Although fornication, adultery, and prostitution were unlawful forms of sexual intercourse for which women could be punished, the laws emphasized the evil of the lust of the male, and in many instances punished only the male partner of a sex

³³Morton, J. D., "The Function of Criminal Law in 1962", p. 11.

act. The ultimate value of unmarried women was their virginity, and the loss of that virginity outside of the bonds of holy matrimony placed a stigma on such women for the rest of their lives. This philosophy stated that such women had been defiled and contaminated to such an extent that no decent man would ever marry such a woman, no matter how innocent a victim she might have been to the evil lust of some man.

However, most of that is gone from our present society, and many of our sex laws have changed. In Canada, fornication, adultery, and prostitution are not illegal forms of human behavior, and there are few forms of unlawful sexual intercourse defined by the Criminal Code by means of which a female can be punished. Although we may have tried to meet the needs of our times, remnants of our past remain to haunt us, and our present laws are far from consistent, nor are they logical. To illustrate, Section 146 of the Criminal Code says:

- (1) *Every male person who has sexual intercourse with a female person who*
 - (a) *is not his wife, and*
 - (b) *is under the age of fourteen years, whether or not he believes that she is fourteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for life and to be whipped.*
- (2) *Every male person who has sexual intercourse with a female person who*
 - (a) *is not his wife;*
 - (b) *is of previously chaste character, and*
 - (c) *is fourteen years of age or more and is under the age of sixteen years,*
whether or not he believes that she is sixteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for five years.
- (3) *Where an accused is charged with an offence under subsection (2), the court may find the accused not guilty if it is of opinion that the evidence does not show that, as between the accused and the female person, the accused is more to blame than the female person.*³⁴

³⁴Martin, J. C., Mewett, Alan W. and Cartwright, Ian, "Martin's Annual Criminal Code 1972", p. 99.

Section 3 provides for a meaningless defence, and I shall ignore this section in what I have to say.

If one, for the moment, ignores the Juvenile Delinquents Act, then the Criminal Code places restrictions on the sexual behavior of every male who is fourteen years of age or more. Section 147 prohibits the prosecution of any male under the age of fourteen under Section 146.

From the point of view of the punishment that is imposed, Section 146(1) has the identical severity as manslaughter, and far exceeds the severity of the punishment that can be imposed for causing bodily harm (up to 14 years imprisonment). From the point of view of the maximum sentence allowed, the punishment could be the same as that imposed for murder, and, indeed, for a male under the age of eighteen the same would be true for capital murder. There is a sense in which our present laws become an open invitation to kill after illegal intercourse has taken place. No additional punishment might be involved. This law allows judges to impose a harsh sentence of this kind even though the male might only be a child of 14 years. Since *sexual intercourse is complete upon penetration to even the slightest degree, notwithstanding that seed is not emitted*,³⁵ the amount of actual bodily harm might be slight indeed.

Surely this type of harshness must be a remnant from our past, a past that implied that a young girl in such circumstances suffered *that fate that was worse than death*. Such a belief might justify the imposition of a punishment that is the same as the one imposed on people who are guilty of homicide of one form or another. But what happens when that belief is no longer held?

The forbidden behavior might have taken place with the consent of the girl, but that is no defence. It might have taken place with the honest belief that the girl involved was older than the ages specified in the Act, but that is no defence. It might have taken place with very slight bodily harm, but that is no defence. If none of these is a defence, then the harm envisaged by those who wrote this law must be great indeed to justify such a harsh punishment. But what is that harm? The law does not say.

The question of the relative age of an offender and the girl involved seems to me to cause complete and utter confusion.

³⁵Martin, J. C., Mewett, Alan W. and Cartwright, Ian, "Martin's Annual Criminal Code 1972", p. 10.

According to the Criminal Code, any person over the age of fourteen is deemed to be competent to be tried and convicted of any offence. Even children, between the ages of seven and fourteen, can, under certain circumstances, be convicted of crimes under the Criminal Code. Girls over the age of fourteen can be tried for almost any offence under the Criminal Code, including murder, and they are deemed, without proof, to know the nature and consequences of their conduct. But when it comes to their sexual behavior the absolute converse is assumed to be the case. They are deemed, without proof, to be unaware of the nature and consequences of their conduct. This seems to me to be inconsistent with any reasonable definition of an age at which people will be deemed to become adults, an age at which they become fully responsible for all of their actions.

But that is not all. The Juvenile Delinquents Act, an Act of the Federal Government defines a child in the following ambiguous way:

2(1) *In this Act*

‘child’ means any boy or girl apparently or actually under the age of sixteen years, or such other age as may be directed in any province pursuant to subsection (2);

2(2) *The Governor in Council may from time to time by proclamation*

(a) direct that in any province the expression ‘child’ in this Act means any boy or girl apparently or actually under the age of eighteen years, and any such proclamation may apply either to boys only or to girls only or to both boys and girls,
...³⁶

The latitude allowed by a Federal Statute is actually exercised by the provinces. In some provinces a *child* means any boy or girl under the age of eighteen. In some provinces a *child* means any boy or girl under the age of sixteen. In Alberta a boy is a *child* only if he is under the age of sixteen, and a girl is a *child* if she is under the age of eighteen. So that under Federal jurisdiction, with a definition supplied by the Government of Alberta, an Alberta boy of sixteen must be tried for offences under the Criminal Code as an adult, while in other provinces he normally will be tried under the Juvenile Delinquents Act, and can only be tried as an adult if the jurisdiction of the juvenile court is waived.

³⁶The Juvenile Delinquents Act, Section 2(1) and 2(2).

Notice the difference in jeopardy involved. If a sixteen-year-old boy is tried for an offence under Section 146 of the Criminal Code, then that person, if convicted, may be liable for life imprisonment. But if he is tried under the Juvenile Delinquents Act then Section 3(2) of that Act says:

*Where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision.*³⁷

Hence, in Alberta, a sixteen-year-old boy convicted under Section 146, might be sentenced to life imprisonment. In other provinces, under the same circumstances, a sixteen-year-old boy is not dealt with as an offender, but as a person requiring help. It is difficult to envisage a more disparate treatment of people who commit the same offence. It is not to the credit of the legal profession, the judges, nor to those who govern to have allowed such a situation to have existed for so many years.

If it is deemed necessary to choose, for the purpose of the Federal law, an age of competence, then consistency would demand that:

- (a) the same ages be chosen for the whole of Canada;
- (b) the same ages be chosen for boys and girls;
- (c) the people below that age should be deemed to be incompetent to stand trial as an adult for any offence under Federal legislation.

Let us go back to Section 146 of the Criminal Code and assume that the offender is an adult. Strangely enough, such a person might be tried for the same behavior under the Juvenile Delinquents Act, under Section 33(1), which says:

- (1) *Any person, whether the parent or guardian of the child or not, who knowingly or wilfully,*
 - (a) *aids, causes, abets or connives at the commission by a child of a delinquency, or*
 - (b) *does any act producing, promoting, or contributing to a child's being or becoming a juvenile delinquent or likely to make any child a juvenile delinquent is liable on summary conviction before a juvenile court or a magistrate to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding two years or both.*³⁸

³⁷The Juvenile Delinquents Act, Section 3(2).

³⁸The Juvenile Delinquents Act, Section 33(1).

Adults can be charged with having sexual intercourse with children under this Act, and indeed this has been done. Note the difference in the measure of the harm envisaged. In one, the Criminal Code says a certain type of behavior carries a liability of life imprisonment, but in the other, the Juvenile Delinquents Act, exactly the same kind of behavior carries with it a possible liability of a fine of five hundred dollars and imprisonment for at most two years.

In the Criminal Code, the Doctrine of Mens Rea, does not apply. The commission of the forbidden behavior may carry with it a liability of life imprisonment, and yet an honest mistake in the age of the girl involved is not a defence. Under the Juvenile Delinquents Act, carrying a relatively milder punishment, the prosecutor must *prove* that the offender knew the age of the girl involved, and in spite of this knowledge committed the said forbidden behavior. Surely in view of the jeopardy to the offender, this situation is exactly the opposite of what it should be.

The Attorney General in each province is allowed to make a decision as to the Act under which an offender will be tried. It is possible, and indeed has happened, that offenders in different provinces are punished with quite different degrees of harshness for exactly the same behavior. Worse than that, an adult having sexual intercourse, with the consent of the girl involved, is not committing an offence in some provinces if the girl is sixteen years of age or older, while in other provinces the same behavior is an offence for which the offender may receive two years in prison. All of this is allowed under Federal jurisdiction by Federal law, and by a choice of age that is left to the provinces.

It is not a valid argument, as far as I am concerned, to say that our society must trust those connected with the legal process to use such wide discretion in a wise and fair way. In this instance, ten different Attorneys General are involved, each of whom may have quite different views on the harmful effects of such behavior, and each of whom may well exercise his or her discretion in quite different ways. Discretion under legislation may be needed, but not that much discretion.

Laws such as these should not be written unless the purpose of such laws is stated and the harmful effect involved is explained. At this time in our history, it is difficult for me to envisage any statement of the harmful effect involved that could explain why the law takes such a dim view of sexual intercourse involving an adult male and a female child, but attri-

butes no harm to a similar act involving an adult female and a male child. Indeed, such laws might well contravene the intent of The Canadian Bill of Rights.

The inclusion of the requirement that the girl involved be of *chaste character* must remain a mystery that I cannot solve. Being a man, I am glad that the chastity of women and their virginity are quite different things. If the requirement had involved virginity, I might have understood it, even though I have grave reservations about any act containing legal conditions of this type.

Reading judicial definitions of the past of *chaste character* is of no help to me. Such definitions confuse rather than explain. The Oxford English Dictionary defines chaste as *pure from unlawful sexual intercourse*, while the Funk and Wagnalls Dictionary defines the same word to mean *not guilty of unlawful sexual intercourse*. Either of these definitions should be suitable from a legal point of view, but apparently this is not the case. A female might then be judged to be unchaste if she had been convicted of having participated in unlawful sexual intercourse. If not, she should be deemed to be chaste. The woman involved is not on trial. This would provide a precise legal definition for the concept of a chaste female. However, when the term *chaste character* is used, I, like many judges, can give no satisfactory legal definition of what such a term should mean.

The vagueness allows for a trial within a trial. In almost every instance, the girl involved will have to withstand an attack from the defence that she is not of *chaste character*, without anyone knowing what the term means. The usual line of attack implies a moral rather than a legal definition of this term. It is not the credibility of her evidence that is being challenged, because that evidence might in fact be in favor of the accused. It is her moral character that goes on trial, and such trials within trials should not be allowed to take place. In the words of one judge, chaste character involves the sum total of the *thoughts* and deeds of the girl involved. Even though she stop short of sexual intercourse, she may well have a lewd and lascivious character. All of this is supposed to apply to girls 15 years or younger, and who are still virgins.

I have written at great length about this particular section of the Criminal Code to illustrate the chaos and the confusion that can exist among the laws governing the so-called criminal behavior of human beings. This type of chaos and confusion exists in almost all of the laws of the Criminal Code that deal

with human conduct that at one time or another might have been considered to be immoral. Vagueness enters into these laws because those who govern are unwilling to state explicitly the purpose of the law, the harmful effects that the law attempts to eliminate, to define as precisely as possible the terms used, and to state explicitly the types of defence that should be available to the accused.

There is no reason why a society should not have a law forbidding sexual intercourse between an adult and a child, if that society envisages there are harmful effects of such behavior. It would seem to me that such a society should word a law in the following way:

Every adult who has sexual intercourse with a child who is not his or her spouse is guilty of an indictable offence and is liable to imprisonment for ten years.

Purpose

Sexual intercourse among adults is deemed to be legal as long as the consent of both partners is willingly given. It is deemed that a child does not have the mental competence to give the consent required to make the act legal, and therefore such behavior will be forbidden by law.

Harmful Effects

Sexual intercourse involving an adult and a child might lead to some bodily harm, to some mental harm, to an exposure to venereal disease, and might lead to the possibility of an unwanted child being born.

Legal Definitions

- (a) An adult is a person who is sixteen years of age or older.
- (b) A child is a person under the age of sixteen years.

Defence

An adult who has sexual intercourse with a child is given no legal defence. The Doctrine of Strict Liability applies in this case.

Guidelines

In sentencing an adult convicted of this offence, those who adjudicate should normally apply stiffer sentences as the

relative age of the adult and the child increases. The maximum sentence might be imposed if the adult is eighteen years of age or older and the child is under the age of ten. In other circumstances, the sentence should normally be less than the maximum.

If this amount of clarity and precision could be obtained, I can see no good reason why it would be necessary to go back to examine endlessly the judgments that were made in the past. A lawyer could with some high measure of certainty advise a client whether to plead guilty or not guilty. I do not wish to leave the impression that the model I have used is the ultimate in clarity and precision. If this model can be improved, then it should be improved. My model is used to illustrate how stark and naked the Criminal Code is at the present time, and how other material might be included to attain a better standard of clarity and precision.

The American Law Institute has brought forward a *Model Penal Code* and that Institute has made a heroic effort to improve the administration of criminal law. That Code contains new and challenging ideas, ideas that are worthy of serious consideration of adoption by Canadian law. Having said this, it is important for me to go on to say that it does fail in certain important respects.

It still uses phrases like *beyond a reasonable doubt* without providing a legal meaning for such an important part of a trial. This is an easy escape from a serious study of a proper standard of proof that the court might use, but it is an escape that should not be used in writing what is supposed to be a model penal code. It still uses the fiction of the law that there exist reasonable people, law-abiding people, and a host of other people, whose behavior can be used as standards by which to judge the misbehavior of other people. It still uses vague and obscure language to describe relatively simple ideas.

Although the Model Penal Code represents a tremendous and worthwhile effort, we in Canada can do better.

The laws of Canada, including the Criminal Code, should be rewritten. It will take care, thought, time and money to rewrite these laws, but the stakes are high enough to warrant all the care, all the thought, all the time, and all the money, we can afford to give to the protection of human life, human liberty, and human freedom.

THE OPEN COURT

Among all legal procedures, the holding of trials in a court open to the public is one that is truly treasured, and is rarely challenged. Jeremy Bentham describes its virtues in the following words:

*In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial. The security of securities is publicity.*³⁹

This is rhetoric. It may have been worthwhile rhetoric for a reformer to use in fighting the evils of a *Star Chamber*. It was consistent with Bentham's view that a fundamental purpose of the law was to protect the members of a society from the evils of government and the evils of government agencies. But all of this was written about two hundred years ago. Surely the time has come when we as a society have the right to question the magnificent benefits that were promised for the open court.

When I observed the actions of our Provincial Court, I could not escape an eerie feeling that I was watching a play in which tired actors, pushed into a state of complete exhaustion, were uttering the same lines over and over again, without feeling and without understanding. It did not seem to matter if words like these, *You are charged with unlawfully . . . How do you plead, guilty or not guilty?*, were being read to a person accused of murder or if they were being read to a person accused of a parking violation. When I timed the duration of cases, and found that the complete adjudication procedure was measured in minutes, then I began to wonder whether justice has retained any place at all among the Provincial Courts of Canada, open as they are required to be.

I began to wonder what had happened to Jeremy Bentham's *security of securities*, and why our open courts no longer seem to apply any checks to the appearance of judicial injustice. The names of people, not charged with any offence, are often

³⁹Ontario Law Reform Commission, "Report on Administration of Ontario Courts", Part I, 1973, p. 205.

bandied about in those open courts, and the news media have the power to disseminate to the world, in a matter of hours, serious innuendos concerning people who have no defence. I have begun to wonder whether those open courts, as they have now come to be, may be destroying more lives than they save.

When I read the words of the Law Reform Commission of Canada:

*Bringing wrongdoers to justice means condemning people, holding them up in disgrace and stigmatizing them as meriting punishment, and punishment that may take a particularly shameful form: imprisonment.*⁴⁰

I began to wonder what safeguards were being taken to guard innocent people, wrongly accused of crime, from suffering such stigma. It seems to me that the open court, with the attendant publicity, is an open invitation to all and sundry to jump to the wrong conclusion.

If the presumption of innocence is to mean anything in our system of law, the privacy of people should be guarded up to, and until, an actual conviction takes place. Does the public really have a right to know that people have been accused of crimes even when adjudication later deems them to be innocent of those crimes? I think not.

The confusion that now reigns in those open courts has now become so great that some people answer to the wrong name, and plead guilty to the wrong charges, and it takes months to discover and rectify situations like this. Indeed, I now see none of the benefits that Bentham so clearly saw for those open courts. Although I hardly advocate a return to the *Star Chamber*, I do advocate a serious re-examination of the proper role an open court should play in our scheme of things.

If the purpose of an open court is to protect the accused, then the accused should have an unprejudiced choice as to whether he or she wants to have his or her case heard in an open court.

THE ADVERSARY SYSTEM

In the public hearings held by our Board of Review, few people mentioned the adversary system, but those who did were in favor of retaining such a system as part of our legal proce-

⁴⁰Law Reform Commission of Canada, "Studies on Strict Liability", June, 1974, p. 15.

ture. Other than the fact that they were all lawyers, I wondered why they were not prepared to challenge a system whose use involves one of the most startling non-sequiturs one could ever experience. Although a serious over-simplification of what really happens, the scene is roughly this:

1. There is no assurance that all relevant facts will be placed before the court. By law and by custom, the defendant can be completely selective in the facts he or she may want to place before a court. Although not always true, it is usually true that the law places no onus on the defendant to help establish the relevant facts pertaining to the trial being held. Further, those who adjudicate are instructed to take no notice of the fact that the defendant has chosen to exercise that right.
2. The prosecutor will normally state legal maxims and cite authorities to prove that the section of the law involved should have this or that interpretation.
3. The defendant, or his legal representative, will also state legal maxims and cite authorities to prove that the same section should have this or that interpretation. Sometimes the interpretation of the defence counsel is quite different from the interpretation advanced by the prosecutor.

The benefit of the adversary system is supposed to be derived from the conclusion that a judge who is given incomplete evidence, and two conflicting interpretations of the law, is, by some miracle supposed to reach a decision in which it will be, beyond a reasonable doubt, clear to every one that justice has triumphed. As a logical non-sequitur, this one is hard to beat.

Actually much of this litigation is due to the vagueness contained in the law, and the carelessness with which the law is written. It is often easy to use logical arguments to show that the same law might have quite different meanings. This is illustrated by the number of different adjudications that are given as the same case proceeds from the lower to the higher courts. It also is illustrated when almost identical cases are given different verdicts in the same courts by different judges. In this, I am not being critical of those who adjudicate. They do the best they can with the imperfect law they are required to administer. I am sure they would do much better if carelessness and vagueness were not such integral parts of our present law.

With the uncertainty that now exists in Canadian law, lawyers have lost much of their ability to predict for clients the outcome of particular cases. It is the courts of ultimate authority that state on an ad hoc basis what the laws of Canada are. Until these courts speak, it is impossible to predict with any certainty anything about the guilt or innocence of the accused, and by that time it is too late.

It was tedious to read case after case in which the facts were the same or similar. The legal maxims were the same, and even the authorities cited were the same. All of this needless repetition takes place because, even under such circumstances, the verdicts are not always the same. Much of this tedious and costly litigation could be avoided by demanding that our laws pass reasonable standards of clarity and precision. In several parts of my report, I have stressed the fact that all systems of law and legal procedures are flawed and imperfect. However, they need not be so flawed and so imperfect as to justify what is going on at the present time. With better precision in writing the law, and with proper guidelines to follow, prosecutors might well refrain from sending to trial many cases that now end up in the courts. Under such conditions, many people might well plead guilty in many cases where the opposite plea is now being made.

With the law written as it now is, there would be a grave danger in doing away with the adversary system. It takes a knowledgeable prosecutor to know which of several different sections of the Criminal Code can, or should, be used to prosecute a particular form of criminal behavior. Having chosen one, it takes an able prosecutor to know which of the material elements must be proven, and to know the degree of proof each of these material elements requires.

Having read the charges, it takes an equally knowledgeable defence counsel to know the alternative defences that exist, and to choose the defence that is mostly likely to succeed. In addition, at the trial, the defence counsel must be alert to possible flaws in the legal presentation of the prosecutor, and may obtain a dismissal, not because the accused is innocent, but because the prosecutor is incompetent. All of this is of mundane occurrence in the world of law, and those who work in this world have become so accustomed to it that they can see little wrong with it.

As I view a trial, the guilt or innocence of the accused may recede far into the background of the thinking of the prosecutor and the counsel for the defence. The only thing that

is important is winning or losing, and not the effect that this or that verdict will have on the accused, or on society itself. So we honor our Clarence Darrows, brilliant criminal lawyers who can openly boast that they . . . but who can rarely boast that none of their clients deserved that particular form of punishment. All of this may be mundane in the world of the law, but it is not mundane for me.

In my scheme of things, a trial would be quite different. The paramount decisions in a trial involve the guilt or innocence of the accused, and a fitting punishment to be imposed on those who are convicted. The ideal situation would be one in which all relevant facts are disclosed, and the adjudication involves laws whose precision and accuracy leave no doubt, reasonable or otherwise, as to what the law says for the case being tried. Although neither of these ideals is capable of being attained, the difference between the ideal and the real can be considerably narrowed from what it is now.

My philosophy of the law would expect all people connected with a trial to help those who adjudicate make an extremely difficult decision. If an accused denies the court that help, then that fact might well be taken into account by those who adjudicate. I am aware of the legal maxim that *People should not be required to incriminate themselves*, but feel that defendants who exercise the right to remain silent might well lose other rights granted to defendants. It would seem to me that innocent people will willingly cooperate with a court to establish their innocence.

In my scheme of things, it would not be necessary for the prosecutor and the defence counsel to cite legal maxims, backed by the authorities of the past for their particular interpretation of the law. The faith that the legal profession has in the wisdom of the past seems to me to be completely misplaced. When read in conjunction with a modern social conscience, the judgments of the past sometimes seem ludicrous, and often seem inhumane. This observation often applies to our immediate past, as well as to the long and distant past of antiquity.

Indeed, I challenge the courts to experiment with a form of trial in which both the prosecutor and the defence counsel remain silent on the interpretation of the law. Their role might well be reserved for an orderly presentation of the evidence, and the deductions that flow from that evidence. Society should assign to those who adjudicate the duty to interpret the law, without implying that they must be guided by the past, and without subjecting them to legal lessons from the lawyers in-

volved. In such a trial, the preparation for a trial and the length of the trial might be reduced by days and weeks. I doubt that the verdicts reached in such a form of trial would be different from those reached by the legal procedure used today. When they become solely responsible for the interpretation of the law, judges may overcome their reluctance to tell those who govern about laws that are badly written or ill conceived, and about laws that are impossible to enforce.

As long as our system of law remains as it is today, I would recommend that the adversary system be retained. However, if that system of law changes, it might well be that the adversary system might itself be subjected to some drastic changes.

Serge Kujawa asks the following very important question of the legal profession:

In closing I would like to say that the matter of the mental element in the accused is not so important to our criminal law as is the mental element of lawyers and judges. It seems to me that we as lawyers very often forget that we are officers of the court and look upon a criminal trial as a sporting event in which the final score is all that matters. The criminal trial is the showcase of the legal profession. The whole profession is judged in large part by it. I close with this very important question — are we proud of our rules and the way we play the game?⁴¹

THE UNDEFENDED DEFENDER

If ever I become involved in a trial, I will make no attempt to penetrate the labyrinth of the law without a guide, and that guide will be the most competent lawyer that I can afford to hire. In the words of Mr. Justice Sutherland:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know

⁴¹Kujawa, Serge, "Studies in Criminal Law and Procedure", p. 119.

*how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.*⁴²

All of this I believe to be true, and, indeed, support the concept that people should be provided with counsel as soon as he or she enters legal process, long before a trial takes place in a court of law. However, I would be considerably less than honest, if I did not call attention to some evidence that seriously disputes the importance of a person having a defence counsel.

Robert G. Hann of the Centre of Criminology of The University of Toronto has published a two-volume work called, *Decision Making in the Canadian Court System: A Systems Analysis*. This is a new approach to measuring the effectiveness of the legal process and provides some rather interesting and startling conclusions about possible myths in the legal profession. In one of many studies, data are provided for what happens to undefended and defended defenders when both groups plead *not guilty*. The data are as follows:

<i>Decision</i>	<i>Undefended by a Counsel</i>	<i>Defended by a Counsel</i>
1. All charges dropped or withdrawn.	63.8%	55.1%
2. At least one charge dismissed, and all other charges dropped, withdrawn or dismissed.	14.3%	19.4%
3. At least one not guilty verdict at trial, or do not proceed verdict at preliminary inquiry.	2.4%	1.5%
4. At least one guilty or proceed verdict.	19.5%	24.0%

Certainly based on these data alone, people who are undefended by counsel do not suffer by comparison with those who are so represented. The author is very careful to point out that the data needed for this study were not available, and a data base was obtained by an intensive study of the courts over a period of some months. Data collected over such a short period of time are of course suspect, but they are probably the only such data available.

⁴²Report of the Canadian Committee on Corrections, "Towards Unity: Criminal Justice and Corrections", March, 1969, p. 133.

Another possible myth of the legal profession is the so-called benefit to the accused of obtaining the right judge, involving the legal strategy of *judge shopping*. The data produced by Hann do not support the so-called benefits of this strategy, and indeed support the conclusion that it is detrimental to defendants when their lawyers use remands to obtain the judge of their choice.

Hann's study is not definitive, nor does he claim it to be. Nevertheless it is a new approach to measuring the effectiveness of our legal procedures, and it is an approach that should be deemed worthy of future research.

In spite of my strong beliefs in the need for legal representation, this study has certainly given me cause to think. Could it be possible that all the millions of dollars spent on legal aid are not all that effective, and that by and large the undefended defender does just as well as the accused who has legal representation? This is a legitimate question to ask, and the data available are not extensive enough to answer the question in a definitive way. This is a fundamental weakness of our present state of knowledge about our law and our legal process. So much of it is rhetoric, so many statements are made without proof, and the data that would supply definitive answers are just not available. Society is asked to spend millions of dollars to support this or that legal process because of promised benefits. It would be far better if those promised benefits became measurable benefits. In Alberta, informative data relating to the condition and fate of the undefended defender are not collected.

Canada must open up its courts to study and research. The evidence is now overwhelming that something is seriously wrong in the administration of justice, and something must be done to discover what wrongs exist, and how they can be corrected. It will be difficult to do, and will be costly to accomplish, but it should be done.

DISPARITY OF SENTENCES

No critique of the law and the legal process would be considered to be complete without calling attention to the wide disparity that is assumed to exist in the sentences imposed on those who are convicted of crimes. This is just one more aspect of the law in which we suffer from a lack of knowledge.

In our society, we react to sentencing for at least three reasons:

1. We react with outrage when two different people, convicted of the same crime, receive quite different degrees of punishment;
2. We react with outrage when two different people, convicted of different crimes, do not receive punishments that are proportionate to the enormity of their crimes;
3. We sometimes react with outrage when a particular type of offender, say a youthful offender, receives a sentence involving a particularly harsh punishment. This usually is our reaction when a harsh punishment is given to a youthful offender for a first offence.

It is natural for most of us to feel a sense of outrage when the lesser lights of the Watergate conspiracy receive years in prison, while the chief architect of that conspiracy is not required to stand trial. No one can really fault the public for being outraged when a former Vice-President of the United States, being investigated for serious criminal behavior, is allowed to plead *no contest* to a lesser type of crime, and receives a \$10,000.00 fine. Many of us remember only too well the harsh prison sentences meted out to youthful drug offenders for offences that were far less serious in nature than the offences mentioned above.

But these are only example of cases in which judicial discretion was exercised in a way that received public condemnation. No matter how many hundreds, or even thousands, of such examples that can be authenticated, the fact remains that they are just examples of a problem that may, but does not necessarily, exist. We suffer in this area, as in all other areas, from a severe lack of knowledge. No one body is authorized to demand information from the judiciary about the sentences they impose, and there is therefore no way in which meaningful research can be done on this problem.

Those who seek complete uniformity in the practice and procedure of sentencing are seeking the Holy Grail of liberalism, a consistent system of punishment for unequivocally defined crimes. As long as people, using the same facts and the same laws, can reach different conclusions, some seeming disparity in sentences will always occur, and that means till the end of time. Nevertheless, the number of seeming mis-

carriages of justice is large enough to question seriously the sentencing procedure of our courts. At this stage, we need knowledge far more than we need rhetoric.

It is with deep regret that I witness a real reticence on the part of some judges to give written reasons for their choice of a particular sentence in a particular case. When, in some instances, they are required to do so by law, they believe they have met the requirement by the uninformative reply, *I chose the sentence that best suited the circumstances of this case.*

In seeking knowledge of what is happening in our courts, my purpose is not to reduce unnecessarily the discretion that those who adjudicate must have. Indeed, if society ties the hands of judges so tight that they can do no wrong, then it is certain that those bonds will ensure that they can do no right. This is a fundamental defect in the whole liberalist philosophy of the law. My only purpose is to make public the reasons they are doing what they actually do, and to allow the people of Canada a chance to accept or reject those reasons.

The laws of Canada belong to the people of Canada. They do not belong exclusively to those people who are connected with the legal process, to the police, to the lawyers, and to the judges. The people of Canada have a right to know what is going on in their courts, and they do not know because the provision of the necessary information is neither required, nor is it voluntarily made available for study and for research.

In our desperate need to know, it seems only just to demand that every judge give written reasons why certain forms of punishment are chosen, particularly harsh sentences involving imprisonment. This information could be used in a variety of ways, ways that will be explained later in the report.

In our country, the Supreme Court of Canada does not have the jurisdiction to consider an appeal against a sentence that has been imposed. Such appeals are left to the adjudication of the Supreme Court of a province. This system itself envisages ten different ultimate authorities in setting standards of punishment, and it should cause no great surprise that there do in fact exist ten different standards. But that is not all.

Few appeals against sentences are ever made, and when they are, the Appellate Court judiciary will rarely exercise

their own discretion to replace the discretion used by a lower court. Indeed, they expressly say that they would only do so when the sentence imposed by a lower court is manifestly outrageous in nature. When they choose to exercise their discretion, rarely will the higher courts give written reasons for varying the sentence imposed by the lower courts.

With a stark and naked criminal code, a code that contains no guidelines to be used in sentencing, and no written standards imposed by superior courts, Provincial Court judges are forced to create their own guidelines and their own standards. With thousands of such judges, each free to exercise discretionary powers without restraint, it is no wonder that the problem of disparity in sentencing becomes a problem with which the present system is unable to cope.

However, disparity in sentencing can take different forms. With Provincial Court judges being asked to adjudicate over 10,000 cases a year, the sentence imposed will become automatic and uniform. As soon as a person becomes convicted of a crime, the judge will impose so much fine, so much prison, or so much of both. There just is not enough time for a Provincial Court judge to explore thoroughly the possibility of mitigating circumstances, and to use the discretion every Provincial Court judge should have in bringing a trial to its ultimate conclusion. For me, the disparity of such uniformity makes a real mockery of the judicial function. Although uniformity in sentencing may well be seemingly achieved, the actual sentencing will tend to become uniformly bad rather than uniformly good.

It is clear to me that the phenomenon of disparity in sentencing cannot be measured without some new procedure being introduced into our legal process. It is also clear to me that any problems that are uncovered by a serious study of this phenomenon will never be solved without the addition of some body that is given the power to resolve such problems. For these reasons, I would recommend four things:

1. Among other information, the Criminal Code should contain:
 - (a) some general principles of sentencing;
 - (b) some specific guidelines about sentencing for every section of that Code;
2. Provincial and Federal Appeal Boards should be created with, at least, the following powers and duties:

- (a) the Provincial Appeal Board should have the power to vary the sentence imposed as a result of any offence defined by Provincial jurisdiction;
 - (b) the Federal Appeal Board should have the power to vary the sentence imposed as a result of any offence defined by Federal jurisdiction;
 - (c) each Appeal Board should have the power to collect information about sentencing as it sees fit;
 - (d) each Appeal Board should be required to provide for a continuous study of the data connected with sentencing, to publish annually an analysis of this data, and to make recommendations as it sees fit;
3. All appeals against sentences should be adjudicated by one or other of the Appeal Boards, and no appeals against sentences should be adjudicated by any other court in the judicial system;
 4. Every judge, in a court of first instance, should be required to give an Appeal Board all the information about the sentences that are imposed, and the reasons for those sentences, that an Appeal Board sees fit to request. To be meaningful, those who adjudicate must be given the time to consider carefully the sentences they impose, and to write detailed reasons for their choice of a particular sentence.

In the past, the concept of a single sentencing board has been advanced many times and has never gained favour with the legal profession. In my reading, I have not come across the suggestion made in this report. Nevertheless, I am sure that this is due to my ignorance of legal literature, and some legal scholar will unearth the same or a similar suggestion from the mountains of legal literature that now exist. Indeed, cogent arguments probably have already been given why such a system will not work, but that does not trouble me.

The greatest advantage that I see in the creation of Appeal Boards is that there will be a group who are instructed to find out what is actually happening in our courts with respect to sentencing, to identify problems if they exist, and to recommend solutions for such problems. Such a function has not been imposed on any group connected with our legal process, and such a group should be created for that purpose. It

is disgraceful that the problems connected with the disparity of sentencing have received so much publicity, and yet nothing has been done to establish the magnitude of the problem that exists, and to recommend remedies, if such remedies are needed. In Canada, our system of courts invites the establishment of thousands of different standards to be used to sentence people convicted of crimes. As far as I am aware, nothing is being done to bring any order to the chaos that might exist.

Since I am against groups being created who deal with problems on an abstract and theoretical basis from the sanctuary of a conference table contained in a closed room, I would want such a group to be actively involved in the confrontation between abstract and theoretical principles and their application to the real cases of the real world. This is why I would want an Appeal Board to play an active, and even an ultimate, role in the adjudication of appeals against sentences.

It is not that I would want an Appeal Board to police the actions of those who must, in the first instance, adjudicate for those who commit crimes. The discretionary powers of judges must remain, but systems standards and systems guidelines must be created for the use of those who must, and indeed do, adjudicate. These standards and these guidelines should be created by those who have knowledge about the whole system, and who have the time and resources to study the effects of that system. Such an important function cannot be left to the haphazard discussions that those who adjudicate may happen to have at this or that meeting.

WRITS OF ASSISTANCE

Several people and groups of people have called my attention to a search and seize procedure called a *Writ of Assistance* that is authorized by law. Although a Writ of Assistance is similar in nature and purpose to a search warrant, the scope of the former far exceeds anything that is envisaged for the latter.

At the present time, four different Acts, The Food and Drugs Act, The Income Tax Act, The Excise Tax Act, and The Customs Act, authorize the issuing of a Writ of Assistance by a judge of the Exchequer Court. Contrary to the discretion allowed to a Provincial Court judge to deny a request for a search warrant, judges of the Exchequer Court must issue

all Writs of Assistance requested by the Minister. A police officer to whom a Writ of Assistance has been issued can search any dwelling-house in any city, and the Writ may be issued for an indefinite period of time.

One prosecutor has described a Writ of Assistance as a *Gestapo Writ*, an apt description for a legal process that should be abandoned. An officer who is in possession of a valid Writ of Assistance can use it, at any time, in any way he or she sees fit. It will allow police officers who have been denied search warrants by a Provincial Court judge to seek a police officer who has a Writ of Assistance, and to obtain a power that has already been denied by a Provincial Court judge.

Although the Board of Review has recognized the need for search and seize procedures, it has also emphasized the conflict that exists between such a procedure and the *right of privacy* that the law should protect for most members of society. Under such circumstances, the law should establish a specific purpose to be accomplished by a specific search and seize process for a specific object, issued for a limited period of time.

It is reasonable to expect that the wide authority given by a Writ of Assistance will be abused, an abuse that should not be tolerated, let alone sanctioned by law.

Certainly the time has come when the need for this legal process should be carefully re-examined, and, indeed, in my opinion, it should be abandoned.

THE LANGUAGE OF THE LAW

The law belongs to the people who have chosen to be governed by that law. It is not the private domain of the bar, the bench, and the police. For this reason, it seems to me to be axiomatic that the law should be written in the language of the people, not the archaic, stilted and sometimes meaningless language that is now being used. This does not mean that each person should be capable of being his or her own lawyer. Far from it. The complexity of our society will ensure that highly-trained legal personnel will have important roles to play in the years to come. Nevertheless, reasonably educated people should be able, if interested, to read and understand the laws they are expected to obey. Those who are in difficulty with the law should be able, with legal help, to

understand the nature of their difficulties, the alternatives that are open to them, and to make a reasoned choice from among those alternatives.

At the present time, it is extremely doubtful that even highly educated people can understand the language in which the law is written. In some extreme cases, even members of the legal profession have difficulty in providing an unequivocal interpretation of some laws.

In Gulliver's Travels, Jonathan Swift made many a pungent and ironical comment about the laws and customs of eighteenth century England. Gulliver describes in some detail the laws of Brobdingnag, one of which dealt with the language of the law:

No law of that country must exceed in words the number of letters in their alphabet, which consists only in two and twenty. But indeed few of them extend even to that length. They are expressed in the most plain and simple terms, wherein those people are not mercurial enough to discover above one interpretation. And to write a comment upon any law is a capital crime. As to the decision of civil causes, or proceedings against criminals, their precedents are so few, that they have little reason to boast of any extraordinary skill in either.

The laws of Canada might improve considerably if we were to follow the simplicity of the laws that were used to govern the land of the giants. Even then, over two hundred years ago, Swift was not enamoured with the reliance that English law placed on precedents.

CONCLUSION

It is now two years since the Government of Alberta appointed me a member of the Board of Review. During those two years, I spent many hours, many days, and many months, reading about the law, listening to the views of people about the law, and observing the law in action. After all of that, I, like the Law Reform Commission of Canada, have come to the conclusion that there is neither rhyme nor reason to Canadian law, and that chaos and confusion reign in that law.

The evidence is overwhelming that logic and order will not replace that chaos and confusion unless Canadians are

willing to rewrite our Provincial and Federal laws. The evidence is overwhelming that Canadians must have an explicitly stated philosophy of the law, a philosophy that should be scrupulously honest in the statement of the purposes and principles of that law. In one breath, we proudly proclaim the principle of the presumption of innocence, and in the next breath we pass laws that detain people, waiting for trial, for months in gaol-like institutions. That is dishonest. We proudly proclaim that no one is convicted in our courts unless guilt is proven beyond reasonable doubt, only to find judgments after judgments are reversed on appeal to a higher court. Doubt does remain a part of our decision-making process, and pretence that it does not is dishonest. Contradictory principles wander in and out of the law, and sometimes enter the law on the basis of judicial caprice. Indeed, some principles were first enunciated in legal text books, and entered the law by default rather than by design. Major changes in philosophy have taken place without the people being governed being aware of the change. Rarely, as far as I am aware, are those people asked to advise on, and consent to, the principles and doctrines to be used. In a democracy, the law should belong to the members of that democracy, but in Canada the law belongs to an elite group who feel they are not responsible to anyone. This must change. Canadians must take back what is rightfully theirs.

The evidence is overwhelming that the judges of the past did not have the wisdom and foresight to lead us unerringly to acceptable judgments for the present. Acceptable, that is, within the social context of our time. This provides convincing evidence for me to conclude that the case approach to teaching, understanding and administering the law should be abandoned. The law should become a self-contained discipline, a discipline whose assumptions are explicitly stated, a discipline whose conclusions can be drawn from the stated assumptions by the use of deductive reasoning. Indeed, the goal should be to make every individual law a law unto itself. As a minimum, the following information should be given:

1. A statement of the law, and the sanction to be applied;
2. Legal definitions of words contained in that statement, definitions of words that have a technical meaning peculiar to the law;
3. A statement of the purpose of the law;

4. A statement of the harmful effects that accompany the forbidden behaviour;
5. A statement of the possible defences open to a defendant, including the possibility of no defence if the Doctrine of Strict Liability is chosen to apply;
6. A guideline to be used for sentencing the defendants found guilty of committing the offence.

It is not my wish to condemn legal history as worthless and best forgotten. Legal history contains many brilliant ideas, and, like all history has a great deal to teach us about our future. In my scheme of things, however, the repetitious, tedious and unproductive debates about what the law is should end as far as trials are concerned. Although absolute precision and clarity cannot be obtained in the writing of the law, sufficient clarity, precision and simplicity can be obtained to allow those who adjudicate to interpret the law without being subjected to the legal lessons of the prosecutor and the defence counsel.

Few people would quarrel with the principle that the major goal of a trial is to determine the guilt or innocence of the defendant. With circumstantial evidence playing such an important role in so many trials, the replacement of doubt by certainty must always remain beyond the powers of those who adjudicate. Knowing this unavoidable defect in the judicial process, every legal procedure used in a trial should be designed to help judges reach reasoned and logical decisions based on the pertinent evidence that should be made available. None of our present legal procedures, no matter how minute it may be, should be considered to be sacrosanct and beyond public scrutiny. Each legal procedure to be used in the future should be carefully tested to determine whether it helps or hinders the accomplishment of the major goal of a trial.

Jeremy Bentham had good reason to mistrust the government, government agencies, and the judges, of his day. Under such circumstances, it was perfectly natural to attempt to devise legal procedures that would protect individuals from the inherent evils that surrounded them. It was futile then, as it is futile now, to make the control of the political process a major purpose of a trial. No system of law can protect us from the evils of a Hitlerian form of government, once such a government gains power. Such governments make their own laws, and use those laws to advance their own evil purposes. In a trial, the judge and the prosecutor are both agents of the government, and to single them out as representatives of

inherent evil would destroy for me the faith I have in the sanctity of the courts. Any attempt to control the political process by means of an over-kill type of control of judges and prosecutors would almost certainly create an insurmountable barrier for the accomplishment of what should be the major purpose of a trial. For a country like Canada, I prefer to believe that the democratic political process is controlled by the ballot box, and the people of Canada can and will drive out of office those governments that do not serve us well.

Part of our legal procedure can be traced back to antiquity, and the validity of such procedures is rarely questioned. Indeed, the singular isolation of the accused during a trial is a procedure whose validity I seriously challenge. As a society, it seems to be accepted that legal procedures would not be used unless they served some useful purpose, even though nobody seems to know what that useful purpose may be. Why is a deathbed statement considered to be the equivalent of evidence given under oath, evidence that may be subjected to the severest of cross-examination? Although I know the pat answer, there is no evidence supporting the validity of that answer. Why is flight considered to be evidence of guilt? Possibly that concept goes back to the biblical statement, *the wicked flee when no man pursueth and the righteous are as bold as a lion*, but is that sufficient justification for the modern conclusion that is drawn? Everywhere one looks in the law and the legal process, one finds that assumptions are made whose validity rests on rhetoric and polemicism. Rarely have the concepts of the law been placed under a test that only the truth can endure. The time has come when such tests should be applied.

If I had but one plea to make it would be for knowledge of the law and the legal process. If ever these important functions become open to public inspection, I doubt that we shall like what we shall find. If I had a second plea to make, then I would ask that intellectual honesty enter the law in a way that it has never entered before.

It is intellectually dishonest to state that circumstantial evidence can be used to prove, beyond a reasonable doubt, the guilt of an accused. Some of our ancestors believed they had proven, beyond a reasonable doubt, that the earth was flat, but they were wrong. Others believed they had proven, beyond a reasonable doubt, that the earth was the centre of the universe, and they too were wrong. If science has learned anything over the years, it is that the obvious is usually false. Einstein once said something like, *No amount of experimenta-*

tion can ever prove my theory to be true, but one experiment can prove it to be false. That is the kind of intellectual honesty that should enter the law. If we must use circumstantial evidence, then use it we should, but with the open acknowledgment that the conclusion drawn from such evidence might be false.

If I had a third plea to make, I would ask that the law become a self-contained discipline. Without such a discipline, the social contract a society should make with its members has no meaning and no validity.

My analysis has been simplistic in content and theoretical in nature. Simplistic and theoretical concepts have a history of falling when confronted by the hard cold complexities of reality. If this happens to my work, I shall of course regret it. However, that is the proper way of things. If the report of the Board of Review and my additional report evoke nothing more than discussion, debate, and action of some sort or other, then I shall consider my work worth the while. I shall close by saying something about myself that has been said before. On any issue, I may be right or I may be wrong, but I am never in doubt.

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The first two have sent me thousands of pages gleaned from the literature of the law containing material that they believed was worth my while to read. I would like to assure them that I have read everything they sent to me. Much of the factual material, and some of the conceptual ideas, contained in my report was taken from that material. I cannot but wryly add that if the library record is correct then I shall have been the first to read some of this important commentary on the law.

For years, Henry Kreisel has helped me express my thoughts in better English, and I am again grateful to him for the editing work he has done on my manuscript.

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